

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
-- FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,717

LEONARD H. COVINGTON,

213
Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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September 19, 1966

STATE OF NEW YORK

IN SENATE
JANUARY 1, 1910

REPORT

OF THE

COMMISSIONER

OF

THE LAND OFFICE

FOR THE YEAR 1909

ALBANY:

WILLIAM W. BROWN, STATE PRINTER
1910

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I N D E X

	<u>Pages</u>
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTE INVOLVED	16
SUMMARY OF ARGUMENT	18
ARGUMENT:	
I. Appellant's Prior Convictions of Destroying Private Property and Simple Assault Did Not Relate to His Credibility and, Therefore, Their Introduction in Evidence Violated Title 14, District of Columbia Code, Section 305	22
II. The Impeachment of Appellant By His Prior Convictions in the Context of This Case, Where an Instruction on Possession of Recently Stolen Property was Given Violated His Right to a Fair Trial Under the Due Process Clause of the Fifth Amendment.....	32
III. The Impeachment of Defendant by His Prior Convictions of Housebreaking, Simple Assault and Destroying Private Property was Plain Error Because Their Prejudicial Influence so Far Outweighed Their Probative Value That Their Admission in Evidence Deprived Appellant of His Fifth Amendment, Due Pro- cess Right to a Fair Trial	37
CONCLUSION	43

QUESTIONS PRESENTED

1. Whether the introduction of appellant's prior convictions of destroying private property and simple assault to impeach his credibility was plain error when the statute only permitted such impeachment where the prior convictions evinced the dishonest nature of the witness and when the convictions appellant was impeached by did not relate to his traits of honesty or truthfulness.

2. Whether it was plain error to allow impeachment of the appellant with his prior convictions in a case where a premium was placed on the credibility of the appellant under a "recent possession" instruction that permitted the jury to infer that his possession of stolen goods shortly after the offense indicated he took those goods unless he explained his possession to the jury's satisfaction.

3. Whether impeachment of appellant by his prior convictions of housebreaking, simple assault and destroying private property was so unfair as to constitute a denial of due process and, therefore, plain error when the jury probably drew the conclusion from his youthful age of twenty-two that these three crimes indicated he was a lawbreaker who ought to be punished for the good of the community and may have convicted him for that reason.

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>Awkard v. United States</u> , 122 U.S. 165, 353 F.2d 641 (1965).....	26, 27, 38, 39
* <u>Bostic v. United States</u> , 68 U.S. 167, 94 F.2d 636 (1937), cert. denied, 303 U.S. 635 (1938)...	23, 30, 31
* <u>Campbell v. United States</u> , 85 U.S. 133, 176 F.2d 45 (1949).....	19, 20, 31, 38
* <u>Colter v. Einbinder</u> , 184 F. Supp. 523 (D.C.D.C. 1960).....	24, 30, 31
* <u>Drew v. United States</u> , 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).....	26, 27, 30
* <u>Frank v. United States</u> , 104 U.S. App. D.C. 384, 262 F.2d 695 (1958).....	27, 42
<u>Goode v. United States</u> , 80 U.S. App. D.C. 67, 149 F.2d 377 (1945).....	23
<u>Hall v. United States</u> , 84 U.S. App. D.C. 209, 171 F.2d 347 (1948).....	38
<u>Hood & Jackson v. United States</u> , D.C.Cir. Nos. 19,650 & 19,651, decided June 30, 1966.....	37
* <u>International Ass'n of Machinists v. Street</u> , 367 U.S. 740 (1961).....	25
* <u>Jones & Campbell v. United States</u> , 119 U.S. App. D.C. 213, 338 F.2d 553 (1964).....	24
* <u>Kotteakos v. United States</u> , 328 U.S. 750 (1946)...	19, 20, 31, 38
* <u>Lovely v. United States</u> , 169 F.2d 386 (4th Cir. 1948).....	27
* <u>Luck v. United States</u> , 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).....	10, 18, 22, 32, 33, 37

	<u>Page</u>
* <u>Payton v. United States</u> , 96 U.S. App. D.C. 1, 222 F.2d 794 (1955).....	25
* <u>Pinkney v. United States</u> , D.C.Cir. No. 19,925, Decided July 8, 1966.....	26, 39
* <u>Richards v. United States</u> , 89 U.S. App. D.C. 354, 192 F.2d 602 (1951), <u>Cert. denied</u> , 342 U.S. 946 (1952).....	26, 39
* <u>Sang Soon Sur v. United States</u> , 167 F.2d 431 (9th Cir. 1948).....	25
<u>Smith v. United States</u> , D.C. Cir. No. 19,629, Decided March 9, 1966.....	32
* <u>Tot v. United States</u> , 319 U.S. 463 (1943).....	28, 33, 34, 35, 36
<u>United States v. Boyer</u> , 80 U.S. App. D.C. 202, 150 F.2d 595 (1945).....	23
<u>United States v. Clarke</u> , 343 F.2d 90 (3rd Cir. 1965).....	27
* <u>United States v. Gainey</u> , 380 U.S. 63 (1965)...	28
* <u>United States v. Mitchell</u> , 2 U.S. (2 Dall.) 348 (1795).....	25
<u>Walker v. United States</u> , D.C. Cir. No. 19,962, decided June 9, 1966.....	20, 32, 38

Constitution and Statutes:

U.S. Constitution:

Fifth Amendment.....	19, 20, 23, 27, 38
----------------------	--------------------

D.C. Code (1961 ed.)

§ 22-504.....	29
§ 23-3112.....	28

Miscellaneous:

	<u>Page</u>
Comment, Other Crimes Evidence At Trial: Of Balancing And Other Matters, 70 Yale L.J. 763, 766 (1961).....	25, 26, 27, 37
Ladd, Credibility Tests - Current Trends, 89 U. Pa. L. Rev. 166, 178-79 (1941).....	26, 30
Ladd, Witnesses, 10 Rutgers 2. Rev. 522, 531 (1956).....	24, 30
National Conference of Commissioners on Uniform State Laws, 175 (1953).....	24
Note, Procedural Protections of the Criminal Defendant - A re-evaluation of the Privi- lege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L. Rev. 426 (1964)..	26, 42
Rule 106(1)(b), American Law Institute, Model Code of Evidence, 117 (1942).....	24
Tyree, Evidence, 10 Rutgers L. Rev. 324, 339 (1955).....	24

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,717

LEONARD H. COVINGTON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from a judgment and sentence of the District Court dated September 24, 1965 and filed October 11, 1965, by which defendant was convicted of Housebreaking (22-D.C.Code § 1801) and Petit Larceny (22 D.C. Code § 2202). By order of the District Court, filed October 4, 1965, appellant was allowed to proceed on appeal without prepayment of costs. The District Court had jurisdiction under § 11-521, D.C. Code and this Court has jurisdiction under 28 U.S. Code § 1291.

STATEMENT OF THE CASE

Appellant, Leonard H. Covington, was charged in a two-count indictment with the offenses of housebreaking and petit larceny. These offenses occurred at a shoe-repair shop in Washington, D. C. on the early morning hours of May 30, 1965. The case was tried before a jury on September 1, 1965 and appellant was convicted on both counts. He was sentenced by the District Court to imprisonment for two to seven years on Count One and for one year on Count Two. The sentence on Count Two was to run concurrently with the sentence on Count One.

The physical scene where these offenses took place was described at the trial as follows:

The Spann and Small shoe-repair shop was in a building located at 2405 Benning Road, Northeast (Tr. 14-15, 20, 34). Its side walls were attached to two other buildings. A pool hall was in the building on one side and a barber shop was in the building on the other side (Tr. 20, 34, 40). All three of these businesses had show windows with glass fronts and sides. Each of these windows was covered by a small roof that protruded out from the fronts of the buildings (Tr. 38, 40, 52). The front door of the shoe-repair shop was next to the pool hall. A glass side panel of the show window was on the left-hand side of persons entering the shoe shop. It was this

glass panel that was broken in the commission of the charged offenses (Tr. 20, 27, 31-32).

Spingarn High School was located directly across Benning Road to the north of the shoe-repair shop (Tr. 32, 37). Double street lights were posted some distance apart on an isle running east to west in the middle of the street (Tr. 43-44).

Theodore W. Hunt was an eye-witness to the commission of the crimes at the shoe-repair shop. Mr. Hunt was called by the Government and testified at trial as follows:

He lived at 2407 Benning Road, Northeast which was above the barber shop in the building adjacent to the shoe-repair shop (Tr. 34, 40, 52). He was on his premises at about four or four-fifteen a.m. on May 30, 1965 when a Mrs. Faxe-- who was not a witness in this case (Tr. 70, 104-105),--knocked at his door and told him that she heard glass breaking out in front (Tr. 34-35, 43). Mr. Hunt went to the living room window that faced toward the north part of the street, opened it and looked out (Tr. 35). As he looked down, he was able to see the roof over the shop window of the barber shop. He apparently was also able to see the roof over the shoe-repair shop show window (Tr. 51-52). He said his view was unobstructed and he could see directly into the show window of

the shoe shop. His observations were assisted by a light that was kept in the show window at nighttime (Tr. 38).

From this vantage point he observed two men. One man was standing outside the front of the shoe-repair shop acting as a "lookout". The other was already inside the window, "fumbling around", and had a package in his hand (Tr. 35-36, 48). Mr. Hunt was unable to say precisely how long he watched them, although he estimated it was a minute or a matter of a few minutes (Tr. 50). He watched the man in the shoe store until he came back out the window. He then called the police (Tr. 36, 37). He later testified that he did not see the man inside actually coming out of the window (Tr. 48-49).

When he returned to his living room window after calling the police he observed the two men moving fast, but not running, between the street lights on the isle of Benning Road. They were going toward Spingarn High School (Tr. 37, 49, 50). He saw the man who had been in the window had a package in his hand (Tr. 48). Mr. Hunt then attempted to follow these two men in his automobile but was required to give up pursuit upon discovery that he had no brakes (Tr. 37).

Defense counsel asked Mr. Hunt to describe the man who was standing "lookout". Mr. Hunt said he was wearing dark clothing. He specifically recalled that he was wearing a suit coat but could not remember whether he was wearing a

sport shirt or a necktie. He approximated his height at about that of the man in the window of the shoe shop, which he estimated was five feet, five inches (Tr. 44-46, 47). Defense counsel asked: (Tr. 46)

Q. Nothing was between your head and him?

A. That is right.

Q. So you got a good look at him.

A. I wouldn't say I got a good look at him.

I was more interested in the one that was inside the shop.

Q. Why were you more interested in the one that was inside the shop?

A. That is the one that I wanted to recognize, to get a general appearance of so I could inform the officers.

Defense counsel then asked Mr. Hunt to state what the man inside the shoe shop was wearing. Mr. Hunt said he was wearing dark clothing. It seemed to him that the man had on a long-type coat but he was undecided since his observations had occurred so long ago. [The offenses occurred on May 30, 1965 and this testimony was given on September 1, 1965] He testified that the man in the window wore a body coat but that he might be wrong about its dark color because he "never kept that in mind." Mr. Hunt did not recall that the man in the

window wore a hat (Tr. 47).

Mr. Hunt said his descriptions of these two men were based on what he saw when he went to his window before he called the police. He did not pay any attention to the appearances of these two men at the time he returned to the window and saw them going in between the lights across Benning Road toward the grounds of Spingarn High School (Tr. 49-50).

Mr. Hunt identified Appellant Covington as the man he saw inside the shoe-repair shop window and recognized him as the man he had identified after appellant had been brought back in a patrol wagon later that morning (Tr. 36-37).

Police Officer Patrick M. Buckley was called to the stand by the Government. He testified that he and another officer were in a Scout car at about four or four-thirty a.m. on May 30, 1965 when they received a radio call that "they were breaking into the shoe-repair shop at 2405 Benning Road, Northeast." About fifteen seconds later they received a second call (Tr. 53-54). Defense counsel inquired about this call: (Tr. 61).

Q. And told you what, the second call?

A. The second radio call was a lookout for two Negro males walking across Spingarn lawn in front, one of which [SIC] was carrying a bag.

Q. Now, did it tell [SIC] you anything about what they were wearing?

A. No, it did not.

Q. Did it tell you anything about what they looked like?

A. No. The only description I received was what I just stated (Tr. 61).

Officer Buckley and his fellow officer then proceeded to the rear of Spingarn High School which was approximately two and one-half blocks from the shoe-repair shop. There they saw two Negro males walking west on the sidewalk, one of whom was carrying a brown paper bag (Tr. 54, 62). Officer Buckley's car approached the two men from the rear (Tr. 65) or from the front (Tr. 64). The two men were in the headlights (Tr. 64). When his car was approximately ten feet away from the man he identified at trial as appellant, and whom he said was walking on the edge of the sidewalk closest to the street, he noticed the appellant was carrying two shoes in his right hand (Tr. 55, 65-66). At this same interval in distance and moment in time, he also noticed blood on a tag that was attached to one of the shoes appellant was carrying (Tr. 54, 65). Officer Buckley testified that as he started to get out of his car he instructed the two men to come to him. The man next to appellant

dropped an empty brown paper bag and ran. Officer Buckley immediately arrested appellant whom he testified had made no effort to elude him and had dropped the shoes. (Tr. 59, 63, 67-68.)

Officer Buckley asked appellant where he got the shoes but did not receive a reply until he arrived at the police station. He testified that appellant told him that "he was walking down the street, some dude threw the shoes in his hand and had cut his hand." The officer said appellant did not tell him that a man had offered to sell the shoes to appellant (Tr. 59-61).

Officer Buckley identified Government's Exhibit #1 as the shoes appellant had with him at the time of his arrest. The shoe with the tag on it was in appellant's right hand and he was wearing the other (Tr. 56-57). The officer took these shoes and appellant back to the scene of the crime where he said the shoes were identified by Mr. Small as coming from his store (Tr. 56-57, 69-70) and appellant was identified by Mr. Hunt as the man who had been inside the shoe-repair shop show window. (Tr. 56-57, 69-70.)

Immediately after appellant's identification, he was transported to Number Nine Precinct where Officer Buckley searched his person and found thereon "about thirty-five pennies,

assorted change." At trial Officer Buckley identified Government's Exhibit Number Two as an envelope containing this money. (Tr. 58.)

On Redirect Examination Officer Buckley testified that he had noticed cuts on defendant's right hand and blood on his person. He also noticed a substance appearing to be blood on the glass back at the shoe-repair shop. (Tr. 71.)

Prince D. Small and Willie Spann were called to testify by the Government and each stated that he was a partner with the other in a shoe-repair shop located at 2405 Benning Road, Northeast, in the District of Columbia. (Tr. 14-15, 25-26.) They testified that they had closed this shop around eight-thirty or nine p.m. on May 29, 1965. At about four a.m. on May 30, 1965 each received a phone call and went to the shoe-repair shop. They found that the window pane next to the door of the shop had been broken. (Tr. 16-17, 27.) Mr. Small noticed that thirty-five cents was missing from the cash register. Each of them identified the pair of shoes marked as Government's Exhibit Number One as having come from the shoe-repair shop. (Tr. 18-19, 29.) Neither of them knew the defendant nor gave him permission to enter the store. (Tr. 19, 29-30.)

Government's Exhibits Numbers One and Two were offered and received in evidence without objection and the Government rested.

Counsel approached the bench and defense counsel moved to dismiss on the ground that there was a material variance between the indictment charging theft of two pairs of shoes and the evidence showing theft of only one pair. Upon denial of this motion, defense counsel renewed his pretrial motion to suppress which had been denied by the motions judge. The trial court denied the motion. (Tr. 73.) Defense counsel then stated at the bench as follows: (Tr. 73.)

Mr. Scott: The Defendant will testify.

The Court: He will testify? You say he will testify?

Mr. Scott: He will testify.

Defense counsel did not request a hearing under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Counsel resumed their positions, defense counsel called Appellant Covington to the stand and orally waived opening statement. (Tr. 73.)

Appellant Covington testified on direct examination that he had been to a party in the twenty-seven hundred block of Greenway, Southeast, prior to his arrival by bus in the area of Twenty-Fourth Street and Benning Road on May 30, 1965. He said he was wearing a grey sport coat and a black sweater at the time he alighted from the bus.

Appellant got off the bus across the street from the shoe-

repair shop. About ten feet away from where he left the bus he met a fellow coming toward him whom he knew only by the name of "Billie". Billie asked him if he wanted to buy a pair of shoes. Appellant told him he did and that he wanted to look at them. (Tr. 74-76.)

Appellant Covington and Billie then went across the lot at Springarn High School so appellant could look at the shoes. This route was a short cut to where appellant was going. When they reached a lighted sidewalk in back of Springarn, appellant tried on one of the shoes. It would not fit and he was ready to give the shoes back to Billie when the police came. Before the police reached them, Billie started to run. Appellant grabbed Billie and Billie cut him on the hand with a knife. Then the police reached appellant and arrested him. (Tr. 76-77.)

Without objection by defense counsel or interruption by the Court, Government counsel began cross-examination in the following manner: (Tr. 77-78.)

Q. Your name is Leonard Henry Covington?

A. Yes sir.

Q. Are you the same Leonard Henry Covington who was convicted of destroying private property September 20, 1961?

A. Yes, sir.

Q. In the District of Columbia?

A. Yes, sir.

Q. Also of simple assault on June 13, 1962?

A. Yes.

Q. And of housebreaking on June 11, 1963?

A. Yes

Q. Were you convicted of housebreaking?

A. Yes

The prosecutor elicited from appellant that he had been unemployed for two weeks at the time of his arrest and had obtained twenty-five dollars on the morning of May 29, 1965 by gambling in a pool room. He next cross-examined appellant about his times of arrival and departure at the party of May 29, his drinking there, how many people were there, who they were, who had invited him and whether any of them were in the courtroom. (Tr. 81-82.)

Appellant testified as to his approximate times of arrival and departure, what he had been drinking and the names of two persons present. He was unable to estimate the number of persons present at the party and stated that it was not the type of party to which one was invited. He said that none of the persons at the party ^{who} ~~were~~ present at the trial. (Tr. 81-82.)

He was further cross-examined about his destination when

he departed from the bus across from the shoe-repair shop. Appellant said he was going to a girl friend's house who knew that he was coming. He testified as to where she lived and gave her name. (Tr. 83-84.) He refused to answer the prosecutor's questions about his previous arrangements to meet her: (Tr. 83-84.)

Q. Did she know you were coming?

A. No.

Q. You had made arrangements to meet her?

A. She knew I was coming.

Q. When had you made the arrangements to meet her at her house? When did you talk to her about getting together at three o'clock in the morning?

A. I don't have to answer no more questions like that.

Q. You don't want to answer that question either?

A. All right, I will withdraw the question

He was further cross-examined about his actions after he departed from the bus across from the shoe-repair shop. Appellant acknowledged that he saw the tag on one shoe but stated he was not concerned by it. He said he had seen Billie earlier that day at a pool room but that Billie had not tried to sell him anything at that time. He then described how he had been cut by Billie's knife when he attempted to keep him

from running before the police reached them. He testified that he tried on the shoe with the tag, had taken it off, and was holding it in his right hand when the police arrived. The other shoe was in the bag held by Billie. When Billie began to run, Defendant Covington grabbed him and that was when Billie dropped the bag. (Tr. 88-90.)

The defense rested and counsel approached the bench. The Court asked whether either of them had any requested instructions. Government counsel requested, "just the possession of recently stolen property." Defense counsel said "No, no instructions." Then court recessed for lunch. (TR. 91-92.)

In his closing argument to the jury, the prosecutor discussed the testimony and credibility of the witnesses called by the Government, appellant's possession of stolen property minutes after the offense, the improbabilities of his explanation of possession, his manner of testifying, and the absence of witnesses to corroborate appellant's testimony as to where he was prior to his arrest and where he was going at the time of his arrest. Government counsel did not refer to appellant's previous convictions. (Tr. 94-100.)

Defense counsel, in arguing that the fact appellant did not run at the time of arrest was inconsistent with guilt,

made mention of appellant's previous record: (Tr. 100-101.)

If we assume he is guilty, he also knows as that police car comes up the street he has in his hand stolen goods. All of this he knows. He knows one more thing. He knows he has got a record. He can't assume that the police in that car are his friends.

Government counsel argued on rebuttal, without objection by defense counsel: (Tr. 109.)

Whether there was one pair or two pairs, that also is immaterial. The fact is that Defendant is charged with stealing two pairs of shoes and thirty-five cents. If you find that he had in possession any of these items, that is sufficient. Or if you find that he took any of these items, that is sufficient.

The trial judge gave his charge to the jury including, among other instructions, the following: (Tr. 115-116.)

In passing upon the credibility of the witnesses, you had an opportunity to observe them, to listen to them testify and to consider the testimony as they gave it to you and the manner of testifying. You may consider their demeanor and behavior on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness has any interest in the outcome of the case or would have any motive for testifying falsely, the witness' apparent candor and fairness or lack of it, the reasonableness or unreasonableness, the probability or improbability of the testimony of the witness, whether the testimony was consistent or contradicted with respect to material facts, whether the witness looked and acted as if that witness was telling the truth fully, frankly, honestly and fairly, what that witness knew to be so or the contrary.

x x x

In this case the Defendant testified and the law makes the Defendant a competent witness. In passing upon his credibility, you have a right to take into consideration his situation and interest in the result of your verdict and all the circumstances which surround him and give to his testimony such weight as in your judgement it is fairly entitled to.

Also in this case there has been evidence that the Defendant has been previously convicted of crime. The only purpose of introducing evidence of prior offenses is for consideration by you in determining the credibility of the Defendant. You are instructed that evidence of another offense is not to be considered as evidence of the commission by the Defendant of the offenses here under consideration.

The court also gave an instruction on possession of recently stolen property: (Tr. 123-124.)

In this case evidence has been received tending to prove that the Defendant had in his possession soon after the alleged offense property taken from the place of the alleged housebreaking. This evidence with its legitimate inferences may be considered by you along with the other facts in the case in arriving at your verdict.

If you find the Government has proved beyond a reasonable doubt that the Defendant failed to explain the possession to your satisfaction, you may draw such legitimate inference from the possession as you deem wise. If, however, the explanation of such possession satisfied you, then, of course, you will not draw any inference from such possession by the Defendant.

Defense counsel did not object to these instructions (Tr. 124.), and, as has been stated, the jury returned a verdict of guilty on both counts of the indictment. (Tr. 126.)

STATUTE AND RULE INVOLVED

Title 14, District of Columbia Code, Section 305

(Supp. IV, 1965) provided:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as witness, either on cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the Court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.

Rule 52(b), Rules of Criminal Procedure provides:

HARMLESS ERROR AND PLAIN ERROR

* * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

1. It is clear that the trial court's discretion to hold an exclusionary hearing on appellant's prior ~~was~~ convictions was not properly invoked under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). However, the correct interpretation of Title 14, District of Columbia Code, Section 305 (Supp. IV, 1965) sets up a legislative standard of relevancy that is a condition precedent to impeachment of witnesses by prior convictions. Unless the conviction sought to be introduced relates to the witness' credibility by relating to his traits of honesty or truthfulness, it is not admissible in evidence. That was the case here with respect to two of appellant's previous convictions. Neither of appellant's prior convictions of destroying private property or simple assault was of a dishonesty-evincing nature. Thus, their introduction in evidence constituted a breach of the condition precedent imposed by Congress in this Act.

The point was not reached with respect to these two convictions where an exclusionary hearing was appropriate under the Luck case, supra. Such a hearing presupposes the necessity of balancing probative value against the prejudicial overtones the prior convictions might have. Since these two convictions had no probative value on the issue of appellant's credibility, they were inadmissible under

the statute and were devoid of that value of relevancy which would bring a Luck hearing into play.

Their admission in evidence constituted a violation of an express command of Congress in Title 14, District of Columbia Code, and this error is cognizable under Rule 52 (b) of the Federal Rules of Criminal Procedure. Kotteakos v. United States, 328 U.S. 750 (1946) and Campbell v. United States, 35 U.S. App. D. C. 133, 176 F.2d 45 (1949).

2. The interaction of the instruction on possession of recently stolen property with the impeachment of appellant by prior convictions of housebreaking, destroying private property and simple assault put the appellant in such a coercive situation that he was deprived of his Fifth Amendment, due process right to a fair trial. That coercive situation developed as follows: If the appellant did not take the stand and explain how he acquired possession of these goods, the instruction encouraged the jury to draw the inference that he stole them. If the appellant took the stand, which he did, and sought to explain his possession to the jury's satisfaction, which he did, he could be impeached by his prior convictions, which he was.

To give an instruction that puts a premium on the appellant's credibility in a case where he has been impeached by his prior convictions is so unfair that it contravenes the

appellant's right to a fair trial which is guaranteed to him under the Due Process Clause of the Fifth Amendment. This constitutional violation is cognizable as plain error. See the Kotteakos and Campbell cases, supra.

3. This Court's decision in Walker v. United States, D. C. Cir. No. 19,962, decided June 9, 1966 made it clear that impeachment of a defendant-witness by a prior conviction that is the same as one of the offenses with which he is presently charged does not constitute plain error. However, it was the impeachment of the twenty-two year old appellant with the three convictions of housebreaking, destroying private property and simple assault that constituted plain error. This is so because it is highly probable that the jury drew the inference from appellant's age and these three convictions that he was a confirmed lawbreaker who ought to be punished for the good of society. They may have convicted him on this basis rather than on the facts of the case.

Under the Due Process Clause of the Fifth Amendment appellant was entitled to the jury's judgment on the facts of the case. If the jury convicted him because of their probable conclusion that he was a lawbreaker, he was denied that right. Such a constitutional violation is cognizable as plain error. See the Kotteakos and Campbell cases, supra.

Mr. Hunt's eye-witness identification of appellant as the housebreaker might have been questioned by the jury because of his dubious ability to observe what he testified to and the rather meager description he gave the police of the two persons whom he saw at the shoe-repair shop.

Certainly the jury might have been curious as to why, in an age of scientific techniques, the blood on the window could not have been matched against the blood on the appellant's hand in order to establish that he was present at the scene of the crime. Yet the Government's evidence with respect to such tests, which presumably they had access to facilities to make, was conspicuously absent.

However, there was clear evidence that appellant was in possession of the pair of stolen shoes. Thus, the appellant's credibility was all important on whether or not the jury was to accept his explanation of the means of acquisition. It was on this all important issue that the jury may have credited the appellant's explanation if their minds had not been poisoned by the introduction of appellant's prior convictions.

I. APPELLANT'S PRIOR CONVICTIONS OF DESTROYING PRIVATE PROPERTY AND SIMPLE ASSAULT DID NOT RELATE TO HIS CREDIBILITY AND, THEREFORE, THEIR INTRODUCTION IN EVIDENCE VIOLATED TITLE 14, DISTRICT OF COLUMBIA CODE, SECTION 305.

It is appellant's position that his impeachment by prior convictions of destroying private property and simple assault constituted plain error because these convictions did not relate to his "credibility as a witness" which was a condition precedent to their use under Title 14, District of Columbia Code, Section 305. It is not appellant's position that the trial court erred in failing to hold an exclusionary hearing, sua sponte, under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Such a hearing presupposes that the convictions sought to be introduced are relevant or probative on the issue of credibility but that their use might be so prejudicial that they should not be allowed in evidence. The existence of relevant evidence with prejudicial overtones warrants the invocation of the trial court's discretion to balance probative value against prejudice. That presupposed situation was not reached in this case with respect to these two convictions because they were devoid of probative value on the issue of defendant's credibility. Therefore, they were clearly inadmissible under the standard of relevancy imposed by Congress in this statute.

Defense counsel informed the Court and the prosecutor at the bench that the appellant would testify. Defense counsel did not request an exclusionary hearing under Luck v. United States, supra. At the end of direct examination, the prosecutor began his examination by impeaching appellant with his prior convictions. Appellant acknowledged that he was the same Leonard Henry Covington who had been convicted of

destroying private property, simple assault and housebreaking.
(See this brief p.11-12 supra).

Title 14, District of Columbia Code, Section 305
(Supp. IV, 1965), (P.17, supra), provided^{1/} that "a person is
not incompetent to testify... by reason of his having been
convicted of crime" but "[t]he fact of conviction may be given
in evidence to affect his credibility as a witness. . . ."
Several cases decided in this jurisdiction suggest that even
though the previous conviction may not relate specifically to
the witness' credibility, it is, nevertheless, admissible on
that issue. See, e.g., United States v. Boyer, 80 U.S. App.
D.C. 202, 202, 150 F.2d 595, 595 (1945); Goode v. United
States, 80 U.S. App. D.C. 67, 68, 149 F.2d 377, 378 (1945);
Bostic v. United States, 68 App. D.C. 167, 168, 94 F.2d 636, 637
(1937), cert. denied, 303 U.S. 635 (1938). This interpretation
ignores the express words and purpose of the statute. Further-
more, such a construction raises substantial questions of
constitutionality under the Due Process Clause of the Fifth
Amendment and, therefore, must be rejected.

The statute provides in plain words that prior con-
victions are admissible to affect a person's "credibility as

^{1/} This was the statute in force at the time of trial.
The statute currently in force is unchanged. D.C.
Code § 14-305 (Supp. V, 1966).

a witness." If the prior conviction sought to be introduced does not specifically relate to the witness' credibility, simple logic compels the conclusion that it is not rendered admissible by this statute. The only legitimate reason for the introduction of prior convictions under this statute is to impeach the witnesses' credibility. Judge Youngdahl pointed this out in Colter v. Einbinder, 184 F. Supp. 523, 5252 (D.C.D.C. 1960):

At the basis of this statute is an assumption--assurance might be more accurate since the criminal conviction is introduced even though it is highly prejudicial and completely immaterial to the issue involved--that the testimony of a person who has demonstrated his dishonesty in the past is unworthy of trust. The basis for this rule does not exist when the crime for which the witness has been convicted is not of such a dishonesty-evincing nature. (footnote omitted)

See Ladd, Credibility Tests--Current Trends, 89 U. Pa. L. Rev. 166, 174-191 (1941) where this premise is examined in detail. See also Jones & Campbell v. United States, 119 U.S. App. D.C. 213, 214, 215 n.4, 338 F.2d 553, 554-55 n.4 (1964), where this Court indicated its disapproval of impeachment by petty misdemeanor convictions which were "unrelated to the traits of honesty or truthfulness."^{2/} Thus, the purpose of this statute

^{2/} See also Uniform Rule of Evidence 21, Handbook of the National Conference of Commissioners on Uniform State Laws 175 (1953); Rule 106(1)(b), American Law Institute, Model Code of Evidence 117 (1942); Ladd, Witnesses, 10 Rutgers L.Rev. 522, 531-32 (1956); Tyree, Evidence, 10 Rutgers L.Rev. 324, 339 (1955).

requires that it be construed to permit impeachment only by those convictions that are of such a dishonesty-evincing nature that they relate to the witness' veracity.

This interpretation of the statute is the better one for an additional reason. It is a cardinal principle of statutory construction that if there are two possible interpretations of a statute, one which would raise a question of constitutionality, and another which would not, then the construction which fairly avoids the constitutional question must be adopted. International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961). As is shown below, unless the prior convictions specifically relate to the defendant-witness' credibility, they are likely to prejudice the minds of the jury and thereby deprive the defendant of a fair trial.

It is a traditional conception of a fair trial that a man shall be convicted only because he is guilty of those acts with which he has been charged. And it is inconsistent with this principle to allow information to go to the jury which might influence them to convict for any other reason. United States v. Mitchell, 2 U.S. (2 Dall.) 348, 357 (1795); Payton v. United States, 96 U.S. App. D.C. 1, 3-4, 222 F.2d 794, 796-97 (1955); Sang Soon Sur v. United States, 167 F.2d 431, 432-33 (9th Cir. 1948); Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 763

(1961). That principle is breached when there is a misuse of evidence of other crimes:

Probably the principal reason for limiting the use of "other crimes" evidence at trial has been the fear that such evidence will prejudice the jury against the accused. The notion of prejudice encompasses two distinct tendencies of jurors. The first is the tendency to convict a man of the crime charged, not because he is guilty of that offense, but because the evidence introduced indicates that he is a...."bad man" who should be incarcerated regardless of his present guilt. A conviction for this reason would violate the principle that a man may be punished only for those acts with which he has been charged. The second is the tendency to infer that because the accused committed one crime, he committed the crime charged....
(Footnotes omitted)

70 Yale L.J., supra, at 763. See Pinkney v. United States, D.C. Cir. No. 19,925, decided July 8, 1966 (slip op. at p.3); Awkard v. United States, 122 U.S. App. D.C. 165, 167, 352 F.2d 641, 643 (1965); Drew v. United States, 118 U.S. App. D.C. 11, 15, 331 F.2d 85, 89 (1964); Richards v. United States, 89 U.S. App. D.C. 354, 357, 192 F.2d 602, 605 (1951), cert. denied, 342 U.S. 946 (1952). Note Procedural Protections of the Criminal Defendant--A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime, 78 Harv. L.Rev. 426, 441 (1964). The effectiveness of limiting instructions in preventing improper use of other crimes evidence is doubtful where the previous convictions are of such a nature that either of the two previously mentioned

jury tendencies is highly operative. Awkard v. United States, supra, 122 U.S. App. D.C. at 167, 352 F.2d at 643; 70 Yale L.J., supra, at 765, 777. But as long as the prior convictions have a specific peg of relevancy in their relationship to the witness' credibility, and as long as the dirty linen hung upon the peg does not completely obscure it, then, there is some basis for hope that the jury will obey the limiting instruction. 70 Yale L.J., supra, at 769 n. 37. That hope is dashed where there is no peg of relevancy, for, if the convictions do not relate to the credibility of the witness there is no proper use to which the jury may put them. Their use at all warrants the presumption that they will be misemployed as a justification for convicting the accused. Drew v. United States, 118 U.S. App. D.C. 11, 15-16, 331 F.2d 85, 89-90 (1964). Consequently, the accused is deprived of their judgment solely on the relevant facts surrounding the charge against him and is deprived of his right to a fair trial under the Due Process Clause of the Fifth Amendment. Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948); Cf. Frank v. United States, 104 U.S. App. D.C. 384, 386, 262 F.2d 695, 697 (1958).^{3/}

It is a serious indictment of Congress to say that it legislated to permit this result under Title 14, District of Columbia Code, Section 305. Yet, this is the conclusion that

^{3/} United States v. Clarke, 343 F.2d 90 (3rd Cir. 1965)

must obtain if the statute is construed to permit impeachment by prior convictions without regard to whether they relate to the witness' traits of honesty or truthfulness. In those cases where the convictions do not so relate, as has been demonstrated, serious constitutional questions arise in connection with the defendant's right to a fair trial. Congress simply could not make prior convictions admissible on the issue of the defendant-witness' credibility if they do not in fact relate thereto or are related in tenuous manner. The previous convictions must be rationally connected to the witness' credibility. Cf. United States v. Gainey, 380 U.S. 63, 67 (1965); Tot v. United States, 319 U.S. 463, 467 (1943).

Thus the interpretation of this statute which fairly avoids these substantial questions of constitutionality is that the only convictions that are admissible for impeachment are those specifically relating to the witnesses' truthfulness or honesty.

Appellant's prior misdemeanor convictions of destroying private property and simple assault did not relate to the traits of truthfulness or honesty and, therefore, were unrelated to his credibility as a witness.

Title 23, District of Columbia Code, Section 3112

(1961 ed.) provided:^{4/}

§ 22-3112. Destroying or defacing buildings, statutes, monuments, offices, dwellings, and structures.

It shall not be lawful for any person or persons to wilfully or wantonly destroy, injure, disfigure, cut, chip, break, deface, or cover or rub with or otherwise place filth or excrement of any kind upon any property, public or private, in the District of Columbia, or any public or private building, statute, monument, office, dwelling or structure of any kind or which may be in the course of erection, or the doors, windows, steps, railing, fencing, balconies, balustrades, stairs, porches, or halls, or the walls or sides, or the walls of any inclosure thereof; or to write, mark, or paint obscene or indecent words or language thereon, or to draw, paint, mark, or write obscene or indecent figures representing obscene or indecent objects; or to write, mark or draw, or paint any other word, sign, or figure thereon, without the consent of the owner or proprietor thereof, or, in case of public property, of the person having charge, custody or control thereof, under penalty of a fine not to exceed one hundred dollars, or imprisonment not to exceed six months, or both such fine and imprisonment.

Title 22, District of Columbia Code, Section 504

(1961 ed.) provides;

§ 22-504. Assault or threatening assault in a menacing manner.

Whoever unlawfully assaults, or threatens another in a menacing manner, shall be

^{4/} This statute has been changed. See § 22-403 D.C.C. (Supp. V, 1966).

fined not more than five hundred dollars
or be imprisoned not more than twelve
months, or both.

It is apparent on the faces of these two statutes
that neither misdemeanor conviction supports any inference
regarding the traits of honesty or truthfulness of the
witness. Ladd, Witnesses, 10 Rutgers L.Rev. 522, 531 (1956);
Ladd, Credibility Tests--Current Trends, 89 U.Pa.L.Rev. 166,
178-79 (1941).

Yet, the trial court instructed the jury that their con-
sideration of these convictions was limited to determining
the credibility of the defendant (Br. supra, p.16). There was
no relevant use to which they could be put. The question of
whether or not prejudice should be found on these facts was
answered by this Court in Drew v. United States, 118 U.S. App.
D.C. 11, 15-16, 331 F.2d 85, 89-90 (1964):

Since the likelihood that juries will make
such an improper inference is high, Courts
presume prejudice and exclude evidence of
other crimes unless that evidence can be
admitted for some substantial, legitimate
purpose.

The Court should be advised that witnesses were held
subject to impeachment by prior simple assault convictions in
Bostic v. United States, supra, 68 App. D.C. 167, 94 F.2d 636
(1937), cert. denied, 303 U.S. 635 (1938) and Colter v.
Einbinder, supra, 184 F. Supp. 523 (D.C.D.C. 1960). However,

the Bostic case, supra, depended upon an erroneous interpretation of the statute by construing it to allow impeachment by prior convictions without regard to whether they related to the traits of truthfulness or honesty. Judge Youndahl in the Colter case, supra, although "implicitly" acknowledged that a proper interpretation of the statute required exclusion of a simple assault conviction by virtue of the statute's purpose, "apparently" felt compelled to follow the Court's holding in Bostic, supra. See Colter v. Einbinder, supra, 184 F. Supp. at 525 n.4. Neither case should serve as precedent here for admission in evidence of appellant's simple assault conviction because, under the proper interpretation of the statute, they did not relate to his credibility.

Since neither of these misdemeanor convictions related to appellant's credibility, their admission in evidence was in violation of Title 24, District of Columbia Code, Section 305. This violation of a "specific command of Congress" was plain error under Rule 52(b) Fed.R.Crim.P. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946); Campbell v. United States, 85 U.S. App. D.C. 133, 136, 176 F.2d 45, 48 (1949).

II. THE IMPEACHMENT OF APPELLANT BY HIS PRIOR CONVICTIONS IN THE CONTEXT OF THIS CASE, WHERE AN INSTRUCTION ON POSSESSION OF RECENTLY STOLEN PROPERTY WAS GIVEN VIOLATED HIS RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This Court in (Fletcher) Smith v. United States, D. C. Cir No. 19629, decided March 9, 1966, commended an additional factor for the trial courts' consideration at exclusionary hearings under Luck v United States, 121 U.S. App. D. C. 151, 348 F.2d 763 (1965). It was stated in Smith, supra, (slip op. p. 3):

Where the inferences founded upon unexplained acts are likely to be heavily operative, the court's discretion to let the jury hear the accused's story, unaccompanied by a recital of past misdeeds, may play an important part in the achievement of justice.

Appellant acknowledges that his case is not meaningfully
5/
distinguishable from Walker v. United States, D. C. Cir. No.

5/ It is distinguishable in one respect. Trial counsel in Walker was experienced. (Gov. Br. in Walker at p. 6 n. 2) The same was not true of appointed counsel in this case. (Tr. 3, 11, 72.) A strict rule on invocation of the trial court's discretion works a hardship on the accused through his appointed counsel because, often times, appointed counsel is not experienced in the area of criminal procedure. While this fact would be a poor basis upon which to formulate rules of evidence, the hardship could be lessened if the prosecutor, who deals with these matters daily, were encouraged by this Court to exhibit the same "commendable sensitivity" that Government counsel did in the Walker case. The same sensitivity might be exhibited by a trial judge, whom, as Judge Danaher said in the Luck case, supra, "is more than a mere moderator."

19,962, decided June 9, 1966, with respect to invoking the trial court's discretion under the Luck case, supra. However, appellant would urge that what was suggested in Walker, supra, as merely as additional factor for consideration has received constitutional footing in the alternative holding of the Supreme Court in Tot v. United States, 319 U.S. 463 (1943).

The Court in Tot was concerned with a statute making it unlawful for a convict or fugitive to receive, after a certain date, firearms shipped through interstate commerce and providing that possession created a presumption that such firearms were received in violation of the Act. The statute was invalidated because there was no rational nexus between the fact proven and the ultimate fact presumed.

Mr. Justice Roberts, in delivering the majority opinion, stated there was another ground upon which the statute was invalid. At page 470, he said:

* * *

If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, the defendant is under the handicap, if he takes the witness stand of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearms or ammunition is thus discredited in the eyes of the jury before it is given.

In the case at bar, the trial court instructed, at the request of the prosecutor, on the inference to be drawn from the possession of recently stolen property. (See this Br. p. 16) Under this instruction, just as in the Tot case, supra, the inference warranted conviction unless the defendant came forward with evidence in explanation of his acquisition of the property in question. There, as here, that explanatory evidence had to be credited by the jury if the inference was to be rebutted. In both cases, as the Court said in Tot, "the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions" Consequently, the same prejudice accrued in Tot as here, "His evidence as to acquisition . . . is thus discredited in the eyes of the jury. . . ."

The Court in Tot, supra, "apparently" considered this situation so coercive as to deny appellant his right to a fair trial under Fifth Amendment Due Process.^{5/} Appellant

^{5/} The Court did not specify which constitutional provision it was relying on in its rejection of this statute on the alternative ground discussed herein. In the sentence prior to its statement of the reason why the statute was invalid even if the presumption had been upheld, it was talking about the question of unfairness in positing the burden of going forward on the accused. It is possible the Court premised its argument on the Fifth Amendment right against self-incrimination but it is counsel's belief that the Court was really referring to the due process right to a fair trial under the Fifth Amendment.

urges the Court to find the same occurred here. Appellant acknowledges that several factors existed in the Tot case that are not present here, but they do not require a different result.

It is true that the Court there was dealing with a statutory inference whereas here, the Court is concerned with an inference established by the judiciary. But that does not change the coercive situation in which the appellant was put.

It is also true that in Tot the Court stated that the defendant's evidence as to acquisition was discredited in the eyes of the jury "before it is given", whereas here, it is after he explains his means of acquisition on direct examination that his evidence is discredited through impeachment by prior convictions. Nevertheless, the prejudice results here after he has testified. So long as it attaches before the jury deliberates the time of attachment is immaterial.

Finally, it is true that the Court stated in the sentence just prior to the quote appearing at page 33, this brief, that:

Even if the presumption in question were itself reasonable, we think that the nature of the offense, and the elements which go to constitute it, render it impossible to sustain the statute, for the reason that one element of the offense is the prior conviction of a crime of violence.

319 U.S. *supra*, at 470. Nevertheless, the rationale of the Supreme Court in rejecting this statute in its alternative holding in Tot, *supra*, was that the defendant was placed in an unfair position by virtue of the interaction of the presumption with the consequences of his taking the stand to explain it away. Appellant enjoyed the same status in this case.

III. THE IMPEACHMENT OF DEFENDANT BY HIS PRIOR CONVICTIONS OF HOUSEBREAKING, SIMPLE ASSAULT AND DESTROYING PRIVATE PROPERTY WAS PLAIN ERROR BECAUSE THEIR PREJUDICIAL INFLUENCE SO FAR OUTWEIGHED THEIR PROBATIVE VALUE THAT THEIR ADMISSION IN EVIDENCE DEPRIVED APPELLANT OF HIS FIFTH AMENDMENT, DUE PROCESS RIGHT TO A FAIR TRIAL.

Appellant's prior conviction of housebreaking was clearly relevant on the issue of his credibility as a witness under Title 14, District of Columbia Code, Section 305 because it related to the witness' trait of honesty. However, merely determining that this conviction was relevant on the issue of his credibility did not require that it be admitted in evidence. See Comment, Other Crimes Evidence At Trial: Of Balancing and Other Matters, 70 Yale L. J. 763, 766 (1961). The trial court had discretion to exclude it, if its discretion had been properly invoked and it found that the prejudicial influence of the evidence outweighed its probative value. Luck v. United States, 121 U.S. App. D. C. 151, 348 F.2d 763 (1965) and Hood & Jackson v. United States, D. C. Cir. Nos. 19,650 and 19,651 decided June 30, 1966. However, the trial court's discretion was not invoked.

The only question remaining with respect to this conviction when considered alone is whether its admission in

evidence was violative of due process of law under the Fifth Amendment.

This previous conviction was the same as one of the two charges on which appellant was tried. It is highly probable that the jury used this evidence of limited relevance in an irrelevant way, despite the limiting instruction given by the trial court. (Tr. 116) See Awkard v. United States, 122 U.S. App. D. C. 165, 169-170, 352 F.2d 641, 645-46 (1965). Contra: Hall v. United States, 84 U.S. App. D. C. 209, 171 F.2d 347 (1948). But it must be considered implicit in the Court's decision in Walker v. United States, supra, that impeachment by a prior conviction for the same offense with which the defendant is on trial does not constitute a violation of due process. Otherwise, this Court would have found plain error in Walker, supra, under Kotteakos v. United States, 328 U. S. 750, 765-66 and Campbell v. United States, 85 U.S. App. D. C. 133, 136, 176 F.2d 45, 48 (1949). Thus, the admission in evidence of the housebreaking conviction, when considered alone, was not plain error.

Plain error occurred because the combined admission of appellant's three prior convictions cast "such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he was a lawbreaker who should be punished

and confined for the good of the community." Pinkney v. United States, D. C. Cir. No. 19,925 decided July 8, 1956, slip. op. at p. 3; Richards v. United States, 89 U.S. App. D. C. 354, 357, 192 F.2d 602, 605 (1951), cert. denied, 342 U.S. 946 (1952). A jury determination on this basis clearly deprives the accused of his right to a fair trial. (See this Br. P. 27).

Even assuming that the offenses of destroying private property and simple assault were relevant to the defendant's credibility, contrary to what counsel has argued in the first contention, their admission in evidence with the house-breaking conviction must have cast the defendant in the light of an habitual offender. Perhaps this could not be said if the accused were an older man. But in view of appellant's youthful age of twenty-two and the number of crimes admitted against him, the jury must have drawn this inference. Certainly the trial courts instruction on the limited use of this evidence did not protect against this prejudicial tendency. (Tr. 116.) Pinkney v. United States, supra, slip. op. at p. 3; Awkard v. United States, supra, at 169-170.

Clearly, the Government did not present overwhelming proof of appellant's guilt. The jury might well have

disbelieved Mr. Hunt's eye-witness identification of appellant as the housebreaker.

Mr. Hunt testified that his attention was focused on the man inside the shop window because, "That is the one I wanted to recognize, to get a general appearance of so I could inform the officer." (Tr. 46). Mr. Hunt called the police but the description the officer in the Scout car received was curiously incompatible with his diligence in getting a good description. The first radio call said, "they were breaking into the shoe-repair shop at 2405 Benning Road, Northeast." The second police call was "a lookout for two Negro males walking across Spingarn lawn in front, one of which was carrying a bag." It did not contain a description of what they looked like (Tr. 61-62).

The thirty-five cents, in unspecified denominations, that were taken from the shoe-repair shop were not shown to be the same "thirty-five pennies, assorted change" that were found in appellant's possession. (Compare Tr. 17 with Tr. 58.)

Another piece of evidence that merits comment was Officer Buckley's testimony that he found blood on the appellant's hands and blood on the glass back at the shoe-repair shop (Tr. 71). The jury might have been doubtful about Officer Buckley's statement concerning blood on the window at the store because of his nearly super-human powers of observation. See (Tr. 64-67) But even if they believed Officer Buckley's testimony about finding blood on the glass at

the shoe-repair shop, they still might have been dubious as to the probative value of this evidence. They might have been curious as to why, in an age of scientific techniques, the blood on the window could not be matched to the blood on appellant's hands so as to establish that he was present at the scene of the crime. Yet the Government's evidence with respect to such tests, which presumably it had access to facilities to make, was conspicuously absent.

Officer Buckley's testimony clearly established that the defendant was in possession of the stolen shoes shortly after the offense. This fact of possession was highly important. It was the inference permitted under the possession of recently stolen property instruction, unless the appellant explained his possession to the jury's satisfaction, that placed a premium on the jury's crediting appellant's testimony. The case turned on whether or not the jury believed appellant.

The prosecutor had the following factors in his favor on the issue of appellant's credibility:

As an initial matter, juries are unlikely to place much faith in a defendant's testimony, both because they are aware of the pressure on him to tell an exculpating story and because they know he has had time to prepare the best story possible. The defendant's demeanor on the stand is itself supposed to be a moderately reliable indicator of his honesty, and the prosecutor has other methods with which to discredit the defendant's testimony. . . . Through cross-examination as to the facts he should be able to raise doubts not merely about defendant's general truthfulness, but more importantly, about the credibility of the story the defendant has told in the particular case. He is

also permitted to challenge the defendant's memory and capacity for observation, and he can prove prior statements inconsistent with those made at trial.

Note, Procedural Protections Of The Criminal Defendant--A Re-evaluation Of The Privilege Against Self-Incrimination And The Rule Excluding Evidence Of Propensity To Commit Crime, 78 Harv. L.Rev. 464, 440 (1964). The exigencies of proof certainly did not require recourse to the highly inflammatory evidence of appellant's prior convictions. Their use in evidence deprived appellant of a fair trial. Frank v. United States, 104 U.S. App. D.C. 384, 386, 262 F.2d 695, 697 (1958).

CONCLUSION

For the foregoing reasons it is submitted that appellant's conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

Thomas C. Henley

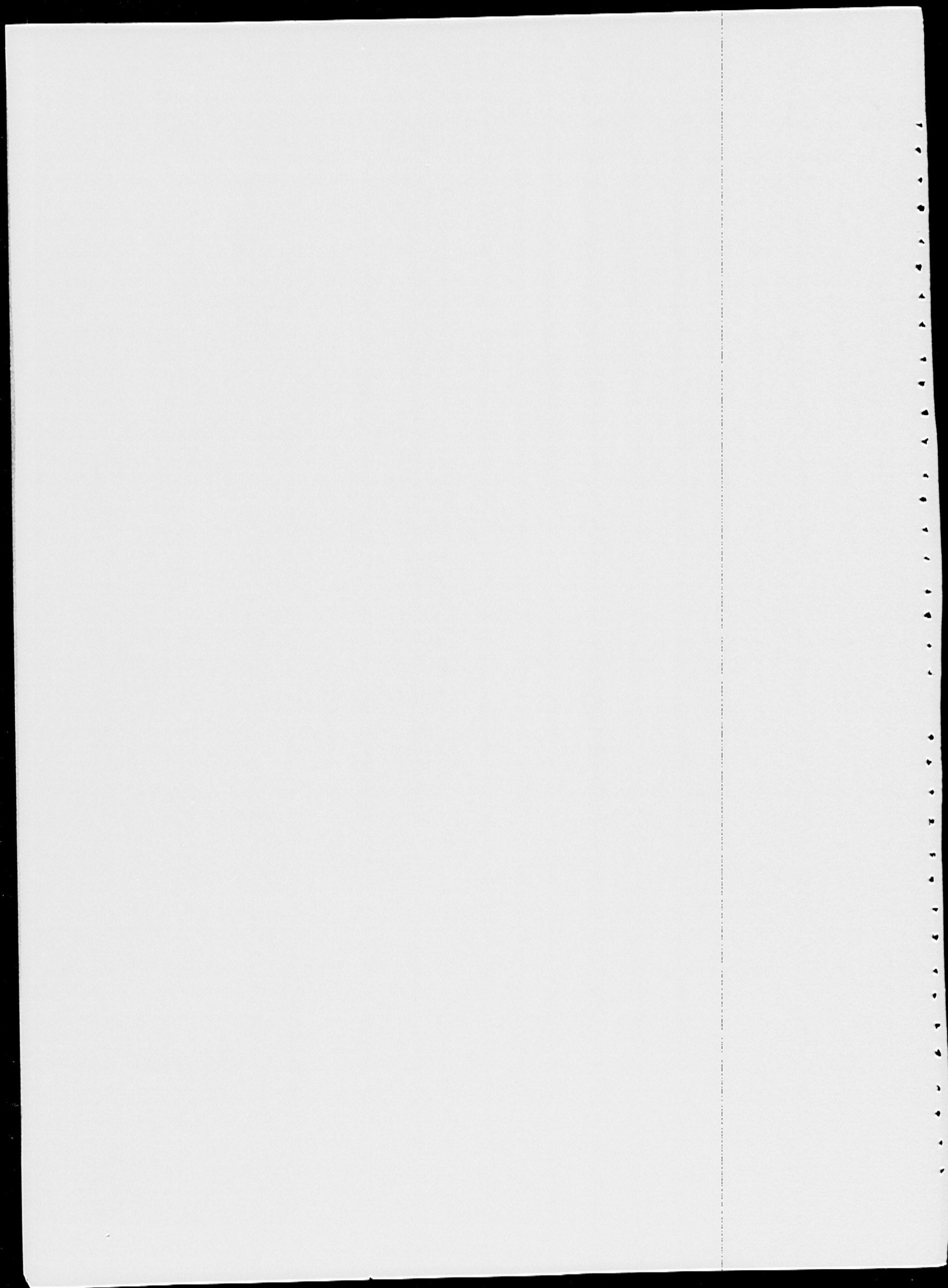
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served personally at the office of the United States Attorney, United States District Courthouse, Washington, D. C. this ____ day of September, 1966.

Thomas C. Henley
Thomas C. Henley



BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,717

LEONARD H. COVINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED

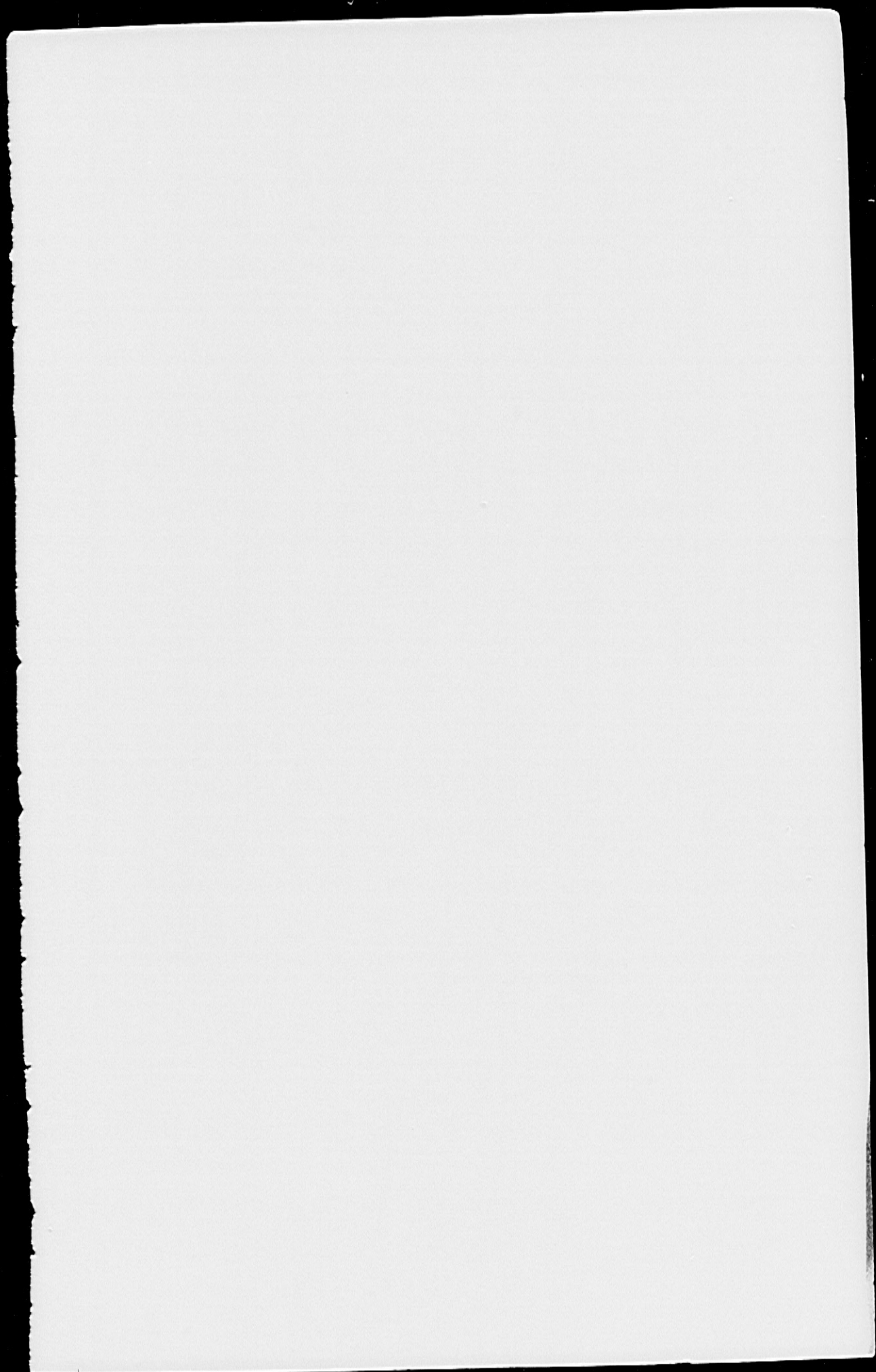
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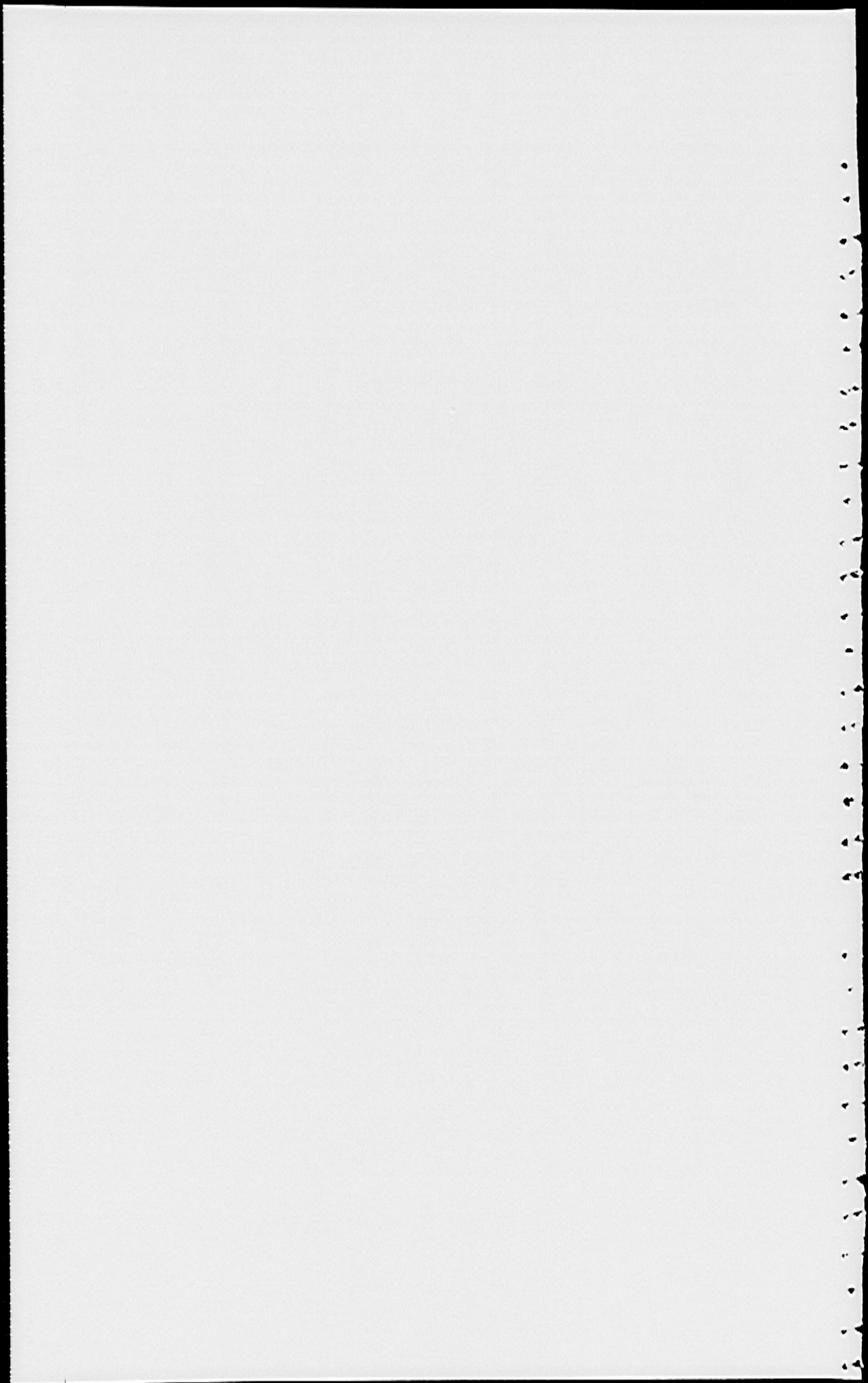
Cr. No. 708-65



QUESTION PRESENTED

In the opinion of appellee, the following question is presented:

Where a defendant puts his version of the events involved before the jury and evidence of prior convictions is offered to impeach his credibility, may he complain on appeal that the impeachment was improper when he did not object to the impeachment at trial and made no effort to invoke the trial judge's recognized discretion to allow or disallow the impeachment and, in so deciding, to consider the very factors now urged on this Court by appellant?



INDEX

	Page
Counterstatement of the case	1
Constitutional provision and statute involved	5
Summary of argument	6
Argument:	
Appellant, having foregone the established opportunity to attempt exclusion of his prior convictions by invocation of the trial judge's discretion, is precluded from asserting their inadmissibility at the appellate stage. In any event, the convictions were not incorrectly introduced	7
A. Relation-to-Credibility Argument	8
B. The Due Process Argument	11
C. The Contention of Plain Error in Regard to Weighing Probative Value Against Assumed Prejudice	13
Conclusion	14

TABLE OF CASES

* <i>Bostic v. United States</i> , 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), cert. denied, 303 U.S. 635 (1938)	8, 9
<i>Bray v. United States</i> , 113 U.S. App. D.C. 136, 306 F.2d 743 (1962)	12
<i>Campbell v. United States</i> , 85 U.S. App. D.C. 133, 176 F.2d 45 (1949)	9
<i>Clawans v. District of Columbia</i> , 61 App. D.C. 298, 62 F.2d 383 (1932)	9, 10
<i>Colter v. Einbinder</i> , 184 F. Supp. 523 (D.D.C. 1960)	10
<i>Goode v. United States</i> , 80 U.S. App. D.C. 67, 149 F.2d 377 (1945)	9
* <i>Hood & Jackson v. United States</i> , D.C. Cir. Nos. 19650-51, decided June 30, 1966	7, 11
<i>Johnson v. United States</i> , 19969, decided September 15, 1966	11
<i>Jones & Campbell v. United States</i> , 119 U.S. App. D.C. 213, 338 F.2d 553 (1964)	9
<i>Joseph v. United States</i> , D.C. Cir. No. 19741, decided March 5, 1966	9
* <i>Luck v. United States</i> , 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)	6, 7, 10, 12, 13
<i>Mallory v. United States</i> , 104 U.S. App. D.C. 71, 259 F.2d 801 (1958)	9
<i>On Lee v. United States</i> , 343 U.S. 747 (1952)	8

II

Cases—Continued	Page
<i>Richards v. United States</i> , 89 U.S. App. D.C. 354, 192 F.2d 602 (1951), cert. denied, 342 U.S. 946 (1952)	9
<i>Schmerber v. California</i> , 384 U.S. 757 (1966)	8
<i>Smith v. United States</i> , — U.S. App. D.C. —, 359 F.2d 243 (1966)	7, 12
<i>Stevens v. United States</i> , D.C. Cir. No. 19883, decided October 20, 1966	7
<i>Tot v. United States</i> , 319 U.S. 463 (1943)	12
* <i>Trimble v. United States</i> , D.C. Cir. No. 19942, decided September 15, 1966	7, 11, 12
<i>United States v. Boyer</i> , 80 U.S. App. D.C. 202, 150 F.2d 595 (1945)	9
* <i>Walker v. United States</i> , — U.S. App. D.C. —, 363 F.2d 681 (1966)	7, 10, 11, 13

OTHER REFERENCES

14 D.C. CODE § 305 (Supp. V 1966)	5
22 D.C. CODE § 403 (Supp. V 1966)	8
22 D.C. CODE § 504 (1961)	8
22 D.C. CODE § 1801 (1961)	1
22 D.C. CODE § 2202 (1961)	1
22 D.C. CODE § 3112 (Supp. V 1966)	8
22 D.C. CODE § 3112 (1961 ed.)	8
MCCORMICK, EVIDENCE § 52 (1954)	8
1 WIGMORE, EVIDENCE § 18 (3d ed. 1940)	8
Comment, <i>Other Crimes Evidence at Trial: Of Balancing and Other Matters</i> , 70 YALE L.J. 763 (1961)	11
Note, <i>Procedural Protections of the Criminal Defendant</i> , 78 HARV. L. REV. 426 (1964)	11

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,717

LEONARD H. COVINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment, appellant was charged with housebreaking (22 D.C. CODE § 1801 (1961)) and petit larceny (22 D.C. CODE § 2202 (1961)). Prior to trial, appellant moved to suppress certain property (that alleged to have been stolen) on the grounds that his arrest was without probable cause and the subsequent search of his person consequently illegal. After hearing, District Judge Jones denied the motion. The case was thereafter tried on September 1, 1965 before District Judge McGar-

raghy and a jury, which returned a verdict of guilty on both counts (Tr. 125-26).¹ Appellant was later sentenced to imprisonment for terms of 2 to 7 years on the house-breaking count and to 1 year on the larceny count, the sentences to run concurrently (Sentencing Tr. 1-4).

At trial, both direct and circumstantial evidence was introduced to show that appellant was one of two men who, by means of a smashed show window, broke into a shoe-repair shop in Northeast Washington in the early morning hours of May 30, 1965, and stole at least one pair of shoes² and thirty-five cents in change (Tr. 15, 16, 17, 27, 28, 36). Theodore Hunt lived in a building adjacent to the shoe-repair shop and was an eyewitness to the crime (Tr. 34). Hunt testified that about 4:00 or 4:15 a.m. on the morning of the crime, having been alerted by a roomer who heard the sound of breaking glass, he went to the front of his house, opened the window, and looked out (Tr. 35, 41-42). The show window of the shoe-repair shop was at a lower level (Tr. 38, 40, 41, 51-52), the spot was lighted by double street lamps (Tr. 43-44), the shop window was itself lighted (Tr. 38), and Hunt had an unobstructed view of the shoe-repair shop and could look easily into its window (Tr. 38). Looking into the shop window, he saw one man inside the show window and another man stationed outside the shop (Tr. 36, 45). Hunt concentrated on the man inside the window, who was wearing dark clothes (Tr. 47), so that he could describe him to the police (Tr. 46); at trial Hunt identified appellant as that man (Tr. 36). Appellant had a package in his hand and when Hunt observed him come back out of the show window he called the police (Tr. 36). When he returned to his observation point

¹ "Tr." refers to the transcript of the trial on September 1, 1965. "M.Tr." refers to the transcript of the hearing on the motion to suppress, held on August 18, 1965. Reference to the transcript of sentencing on September 24, 1965 is indicated by "Sentencing Tr."

² One of the partners who owned the store testified that one pair of shoes was stolen (Tr. 28). The other partner testified that two pairs were missing (Tr. 17).

Hunt observed the two housebreakers walking across the street (Benning Road) toward Spingarn High School (Tr. 37).

Officer Patrick Buckley of the Metropolitan Police Force testified that between 4:00 and 4:30 a.m. on the morning of the crime he and his partner received a radio call to investigate a housebreaking at the shoe-repair shop (Tr. 53-54). En route and about fifteen seconds after the first radio alert, the officers received a second radio call, this one containing a description of two Negro males walking across Benning Road toward Spingarn High School (Tr. 54, 61); the call also noted that one of the two men was carrying a paper bag (Tr. 61).³ As the police car approached the rear of Spingarn High School, Officer Buckley saw two Negro males in his headlights (Tr. 64), one carrying a paper bag (Tr. 54). The officer also noticed that appellant, who he noticed was wearing dark clothing (Tr. 62), was holding two shoes in his hand, one of them bearing a blood-stained tag (Tr. 54, 55). As the officer jumped out of the car, one of the pair fled (Tr. 54).⁴ Appellant dropped the shoes (Tr. 66), but was immediately arrested (Tr. 54, 59). Of the two shoes appellant was carrying, one was a size 9 and one a size 11; on his feet, appellant was wearing the mates to the shoes he had carried in his hand (Tr. 55-56, 68-69). Appellant's hand was cut and he appeared to have blood on his person; blood was also found on the broken window of the shoe-repair shop (Tr. 71). A subsequent search of appellant's person revealed about thirty-five cents in change (Tr. 58). The tagged shoe appellant had been carrying and its mate on his foot were identified as having been taken from the shop (Tr. 18, 56).

³ At the hearing on the motion to suppress there was testimony that the second call connected the description to the housebreaking (M. Tr. 24-25).

⁴ Officer Buckley's partner pursued the other suspect but he was never apprehended (Tr. 57; M. Tr. 27).

Without seeking any ruling as to whether or not the Government would be allowed to impeach appellant if he offered his credibility to the jury, appellant's counsel, whose ability was later praised by the trial judge (Sentencing Tr. 3), stated that appellant would testify (Tr. 73). Although on several occasions he balked at questions asked on cross-examination (Tr. 79, 82, 84), as it emerged, appellant's story was basically that he was an innocent victim of circumstances. Appellant asserted that he had left a party in Southeast Washington about three o'clock that morning (Tr. 74-75). Appellant's home was also in Southeast (Tr. 74), but he explained his presence in Northeast by stating that he had taken a bus to a point across the street from the shoe-repair shop, intending to visit a girl friend (Tr. 76, 83-84). As he got off the bus, he met a man known only to him as "Billie" (Tr. 75-76). "Billie" asked appellant if he wanted to buy a pair of shoes and appellant, stating that he wanted to look at the shoes, walked across the street toward the lighted high school area (Tr. 76-77). Although he testified on direct examination that the shoes would not fit and he was ready to return them when the police came (Tr. 77), appellant stated on cross-examination that he agreed to buy the shoes from his nocturnal and nomadic vendor (Tr. 86). In any event, when the police arrived appellant saw that "Billie" was ready to run (Tr. 77). Appellant, so this story went, grabbed for "Billie," not wanting to get in trouble for what "Billie" might have done (Tr. 87). Thus appellant attempted to explain his cut hand since "Billie" had sliced a knife across appellant's fingers in order to effect his escape (Tr. 77, 87-88). Without objection, appellant's credibility was impeached by evidence of three prior convictions (house-breaking, assault, destroying private property) (Tr. 77-78).

Defense counsel, who before appellant was impeached had carefully elicited testimony showing that appellant made no attempt to flee or otherwise elude the arresting

officer (Tr. 63), thereafter argued to the jury that appellant's failure to flee was indicative of his innocence because it would have been natural for him to flee in view of his prior record (Tr. 102-03). The Government did not mention the prior convictions in its summation. The trial judge instructed the jury in such a way that defense counsel announced his satisfaction (Tr. 124). Included in the charge to the jury were instructions on evaluating the credibility of witnesses and the limited use to which appellant's prior convictions could be put (Tr. 115-16). It took the jury only twenty minutes to decide that the Government's evidence proved defendant guilty of both counts beyond a reasonable doubt (Tr. 125-26).

Appellant's appeal questions only the admissibility of his prior convictions for purposes of impeachment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

No person shall . . . be deprived of . . . liberty . . . without due process of law.

Title 14, Section 305 of the District of Columbia Code provides:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.

SUMMARY OF ARGUMENT

Appellant's contention that his prior convictions should not have been introduced to impeach his credibility is belated and made in the wrong forum. In *Luck v. United States*, this Court placed the type of exclusion appellant seeks within the discretion of the trial judge, but that discretion was completely by-passed by appellant. The consistent refusal of this Court to consider such matters after an unfavorable verdict has additional wisdom supporting it when the new-found claim of erroneous introduction rests on constitutional arguments. Moreover, appellant's claim that the statute is limited to only selected felonies and misdemeanors is disposed of by prior decisions of this Court which have interpreted the statute directly contrary to appellant's contention, and Congress has expressed no dissatisfaction with that interpretation in spite of several re-enactments. Furthermore, the nature of the crime—upon which one of appellant's key arguments is premised—is a factor which the trial court could have considered under *Luck*, had appellant invoked the exercise of that discretion at trial. The contention that the impeachment-by-prior-conviction rule results in an unconstitutional admixture when blended with the inference-possible-from-possession rule is another constitutional contention which, although lacking in merit, cannot be raised for the first time on appeal. In fact, this Court has already recognized the difficulties which result when these two rules are intermingled in the same case, and has accordingly pointed out that the trial judge may weigh this factor in the *Luck* formula; but, again, appellant took no steps to engage that discretion. Furthermore, there was no deterrence to appellant in this case; he testified and gave his explanation of possession. The claim of plain error is exceptionally inapposite in this case. The case against appellant was overwhelming, the trial judge limited the evidence by instruction, and the prosecutor ignored it in his summation; on the other

hand, defense counsel put the evidence to use in attempting to bolster his defense.

ARGUMENT

Appellant, having foregone the established opportunity to attempt exclusion of his prior convictions by invocation of the trial judge's discretion, is precluded from asserting their inadmissibility at the appellate stage. In any event, the convictions were not incorrectly introduced.

(Trial Tr. 73, 77-78, 100-01, 114-16, 121-22; Sentencing Tr. 3)

In *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), this Court held that the impeachment-by-prior-conviction statute, 14 D.C. CODE § 305 (Supp. V 1966), leaves with the trial judge room for the operation of a sound judicial discretion which can play upon the circumstances as they unfold in a particular case. Since *Luck*, this Court has made it clear that a defendant who does not invoke that discretion cannot complain on appeal that the introduction of a prior conviction was error. *Hood & Jackson v. United States*, D.C. Cir. Nos. 19650-51, decided June 30, 1966; *Walker v. United States*, — U.S. App. D.C. —, 363 F.2d 681 (1966). See also *Trimble v. United States*, D.C. Cir. No. 19942, decided September 15, 1966; *Smith v. United States*, — U.S. App. D.C. —, 359 F.2d 243 (1966); *Stevens v. United States*, D.C. Cir. No. 19883, decided October 20, 1966 (per curiam). Here, as in *Walker*, "the defense made no effort, before appellant took the witness stand, to raise with the trial court the question of whether this prior conviction should be kept out in order to assure the availability to the jury of the accused's version of the events in dispute." *Walker v. United States*, *supra*, 363 F.2d at 682. Even where the accused invokes *Luck* in the trial court, but initiates no meaningful discourse so as to engage the trial judge's discretion, this Court has considered itself

without warrant to aside the trial judge's determination. *Hood & Jackson v. United States*, *supra*. If this type of invocation of discretion precludes appellate complaint, a total failure to engage the trial court's discretion surely bars an argument for new trial after an unfavorable verdict, as *Walker* holds.

A fuller discussion of the substantive arguments advanced by appellant might nevertheless be appropriate.

A. *Relation-to-Credibility Argument*

Appellant urges that the convictions for destroying private property⁵ and simple assault⁶ did not fall within the meaning of Section 305 because these crimes allegedly do not reflect on credibility. In advancing this argument, appellant attempts to by-pass the fatal absence of invocation of the trial judge's discretion by urging that these two convictions lacked any probative value whatever and therefore there was no discretion in the trial judge. This attempt fails at several points.

The first defect in the circumvention attempt is that, assuming *arguendo* the truth the no-relation-to-credibility argument appellant urges, he was still required to inform the trial judge of his objection to evidence which he deemed excludable. See, e.g., *Schmerber v. California*, 384 U.S. 757, 765-67 n. 9 (1966); *On Lee v. United States*, 343 U.S. 747, 749-50 n. 3 (1952); 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940); MCCORMICK, EVIDENCE § 52 (1954). Secondly, this Court has already examined Section 305 in the face of the argument that the statute intended to encompass only selected felonies and misdemeanors. *Bostic v. United States*, 68 U.S. App. D.C. 167, 94 F.2d 636 (1937), *cert. denied*, 303 U.S. 635 (1938). In *Bostic* the Court found that the congressional intent in the use of the word "crime" was unam-

⁵ At the time of appellant's conviction for destroying private property the crime was covered by 22 D.C. CODE § 3112 (1961 ed.). Part of that statute is now comprehended by 22 D.C. CODE § 403 (Supp. V. 1966). See also 22 D.C. CODE § 3112 (Supp. V. 1966).

⁶ 22 D.C. CODE § 504 (1961).

biguous and that the term was comprehensive, including all crimes, not only those involving moral turpitude.⁷ Having consistently found the congressional language clear and unambiguous, this Court has insisted with equal consistency that only by stepping outside its province could it amend the unequivocal language of the statute, especially in view of the lack of any congressional manifestation of dissatisfaction with the reading accorded the statute. See *Richards v. United States*, 89 U.S. App. D.C. 354, 356, 192 F.2d 602, 605 (1951), *cert. denied*, 342 U.S. 946 (1952); *Campbell v. United States*, 85 U.S. App. D.C. 133, 135, 176 F.2d 45, 46 (1949); *Bostic v. United States*, *supra* at 169, 94 F.2d at 638.⁸ Only recently, the same argument advanced in the instant case was again urged on this Court; again it was rejected. *Joseph v. United States*, D.C. Cir. No. 19741, decided March 5, 1966 (per curiam). Thus the short answer to appellant's substantive contention is that the convictions involved here—assault and destroying private property, as well as housebreaking—were misdemeanors

⁷ 68 U.S. App. D.C. at 168, 94 F.2d at 637:

The word 'crime' as used in the statute includes both felonies and misdemeanors. * * * The test provided by Congress is clear and certain. Any person who has been convicted of a crime, i.e., a felony or misdemeanor, may have that fact given against him to effect his credit as a witness. * * * *The District of Columbia statute is not limited to convictions of felonies . . . or to convictions of crimes involving moral turpitude . . .* (Emphasis supplied.)

See also *Goode v. United States*, 80 U.S. App. D.C. 67, 68, 149 F.2d 377, 378 (1945); *United States v. Boyer*, 80 U.S. App. D.C. 202, 150 F.2d 595 (1945).

Language in *Clawans v. District of Columbia*, 61 App. D.C. 298, 299, 62 F.2d 383, 384 (1932), which was somewhat hazy in this regard, was explained in *Bostic*. Although appellant relies on *Jones & Campbell v. United States*, 119 U.S. App. D.C. 213, 215 n. 4, 338 F.2d 553, 555 n. 4 (1964), as indicating this Court's disapproval of misdemeanors not involving traits of truth or honesty, the Court there expressly stated that it was not considering that question.

⁸ See also *Mallory v. United States*, 104 U.S. App. D.C. 71, 259 F.2d 801 (1958).

or a felony and as such were permissible material under Section 305.⁹

In respect to this contention of appellant, a further important point should be emphasized. This Court has made plain in *Luck* that one of the factors which the trial judge can consider when his discretion is invoked is the nature of the prior crime. *Luck v. United States*, *supra* at 157, 348 F.2d at 769.¹⁰ See also *Walker v. United States*, *supra*, 363 F.2d at 682 n. 1. Accordingly, provision has already been made for the factor which appellant advances as an absolute. That consideration, however, is left to the discretion of the trial judge in all the circumstances; the nature of the crime does not automatically preclude its use. In this case, appellant did

⁹ It has been specifically held that a previous conviction for assault is within the statute's ambit. *Bostic v. United States*, *supra* in text. *Accord*, *Colter v. Einbinder*, 184 F. Supp. 523 (D.D.C. 1960). Moreover, appellant states that the statute must be read so as to relate only to crimes involving dishonesty and that destroying private property involves no dishonesty (Brief for Appellant, p. 28). The assertion is questionable on its face in view of the fact that the crime basically involves the taking, to some degree, of property away from its owner without any right to do so. Appellant would no doubt concede that larceny is a crime which would fit within his concept of dishonesty; the line between depriving an owner of his property by appropriating it to one's own use (larceny) and by accomplishing the same end by destruction to some extent is, to say the least, murky.

It might also be noted that in spite of appellant's insistence that Congress could not have intended that crimes such as assault and destroying private property could relate to credibility, Congress could have so believed. It is true that various crimes may appear to relate more readily than others to credibility (with perjury perhaps at the top of the spectrum). That is not to say, however, that disregard for society's laws may not be deemed, in the opinion of Congress, to evince such an attitude that past disobedience in the form of a crime may be considered indicative of a disrespect for society's sanctions on testimony under oath.

¹⁰ The Court cited *Clawans v. District of Columbia*, *supra* note 7, and *Colter v. Einbinder*, *supra* note 9, on this point. *Colter* is one of the cases appellant relies upon to urge that convictions such as those involved here must automatically be excluded (see Brief for Appellant, p. 24).

not take advantage of his opportunity to urge that consideration in the proper forum; it is too late to urge it upon this Court as an absolute. Compare *Walker v. United States*, *supra*; *Hood & Jackson v. United States*, *supra*.¹¹

Finally, to the extent that appellant seeks to raise a constitutional question about the impeachment statute in this Court, he is again precluded from raising a question of that nature by his failure to object to the evidence on this basis in the trial court, in view of the special reluctance to consider constitutional questions raised for the first time on appeal. *E.g.*, *Trimble v. United States*, D.C. Cir. No. 19942, decided by opinion September 15, 1966; *accord*, *Johnson v. United States*, 19969, decided September 15, 1966.

B. *The Due Process Argument*

Appellant additionally contends that impeachment of his credibility by means of prior convictions amounted to a denial of due process because an instruction was given on the possible inference which the jury might draw from the possession of recently stolen property (Tr. 123-24). He contends that the inference (along with his

¹¹ Assuming *arguendo* the truth of appellant's argument to the effect that the statute must be interpreted so as to take account of the nature of the crime or else it would be unconstitutional (Brief for Appellant, p. 25), the by-play allowed by *Luck* in this regard moots appellant's contention.

Furthermore, appellant's assertions that prejudice naturally flows from the introduction of prior convictions should not go unchallenged. The fact is, in spite of repeated assumptions that jurors are not intelligent and conscientious enough to follow the cautionary instruction, there is no sound empirical data to that effect. The oft-cited Note, *Procedural Protections of the Criminal Defendant*, 78 HARV. L. REV. 426, 441 (1964), is an example of the unproven assumption. The Note really relies on another Note in 70 YALE L.J. 763 (1961) for its assertions. The Yale Note in turn relies on a *letter* which makes the statement. No facts surrounding the "recent jury studies" are given; thus the reader is unable to make any informed judgment as to the validity of the studies. Such "data" can hardly be the basis upon which to overturn a congressionally adopted choice of rules.

need to explain away his possession) and impeachment are unconstitutionally incompatible (Brief for Appellant, p. 32-36). This contention need not be discussed at length since the claim cannot be successfully raised for the first time at this stage of the proceedings. See *Trimble v. United States, supra*.¹² One factual defect in appellant's argument is that this case did not rest solely on the inference permissible from possession; there was an eyewitness identification of appellant (Tr. 36), who was actually seen committing the crime, and the case went to the jury on a complete identification instruction (Tr. 121-22) in addition to the inference instruction. Secondly, the *Luck* rule also leaves room for a weighing by the trial judge of the deterrent effect of a prior conviction on a defendant's decision whether or not to testify. *Luck v. United States, supra* at 156, 157, 348 F.2d at 768, 769; *Smith v. United States, — U.S. App. D.C. —, 359 F.2d 243, 244 (1966)*. In fact, no such deterrence was occasioned in this case. Appellant testified without any apparent hesitation and his version of the events was put before the jury.¹³

¹² *Tot v. United States*, 319 U.S. 463 (1943), relied upon by appellant for his constitutional assertion, does not support his position. There the Court found a *presumption* unreasonable because it had no nexus in fact. The Court also mentioned what it believed to be an additional defect in the presumption: that it placed the burden of disproving the presumption on the defendant when one of the elements of the crime charged was a prior felony conviction which was likely to discredit the defendant in itself. See 319 U.S. at 470. This dictum was apparently grounded in the Court's conclusion that it was impermissible to place on a defendant the burden of disproving his guilt, especially where his proof is likely to be discredited as a matter of course. See 319 U.S. at 469. The rule of possession involved in this case is not a presumption; it is an inference. The difference is subtle, but substantial, and the Government retains the task of proof beyond a reasonable doubt. See, e.g., *Bray v. United States*, 113 U.S. App. D.C. 136, 306 F.2d 743 (1962).

¹³ Appellant's implication (see Brief for Appellant, p. 19-20, 34) that his explanation should have remained unimpeached because his credibility was crucial in this case has another side. It is in those same cases where credibility is most crucial that material bearing on credibility is most important if the jury is to attempt to discern the truth.

C. The Contention of Plain Error in Regard to Weighing Probative Value Against Assumed Prejudice

Appellant's final contention is that the (assumed) prejudicial effect of the convictions so far outweighed their probative value that this Court must find plain and reversible error in their admission. In effect, this argument is a request that this Court, removed from the atmosphere of trial, indulge in the very balancing process which the Court has insisted must be left in the hands of the trial judge. *Luck v. United States, supra* at 156, 157, 348 F.2d at 768, 769. And once more it must be noted that appellant did not invoke the trial court's discretion.¹⁴

The claim of "plain error" in this case deserves further, although brief, mention in several additional respects. The evidence set out in the Counterstatement, *supra*, demonstrates the unconvincing nature of appellant's protestation that this case is one in which "the Government did not present overwhelming proof of appellant's guilt." (Brief for Appellant, p. 39.) Moreover, defense counsel made affirmative use of the evidence concerning prior convictions in arguing to the jury that appellant's reaction at the time of arrest was indicative of innocence (Tr. 101).¹⁵ In light of this and the absence of any reference to the convictions in the prosecutor's summation, and viewed in the context of the trial judge's careful limiting instruction (Tr. 116), a claim of plain error is exceptionally unsupportable in this case. Compare *Walker v. United States, supra*.

¹⁴ The defendant's age, which appellant presses on this Court (Brief for Appellant, p. 39), was a factor properly presentable to the trial judge. *Luck v. United States, supra* in text, at 157, 348 F.2d at 769.

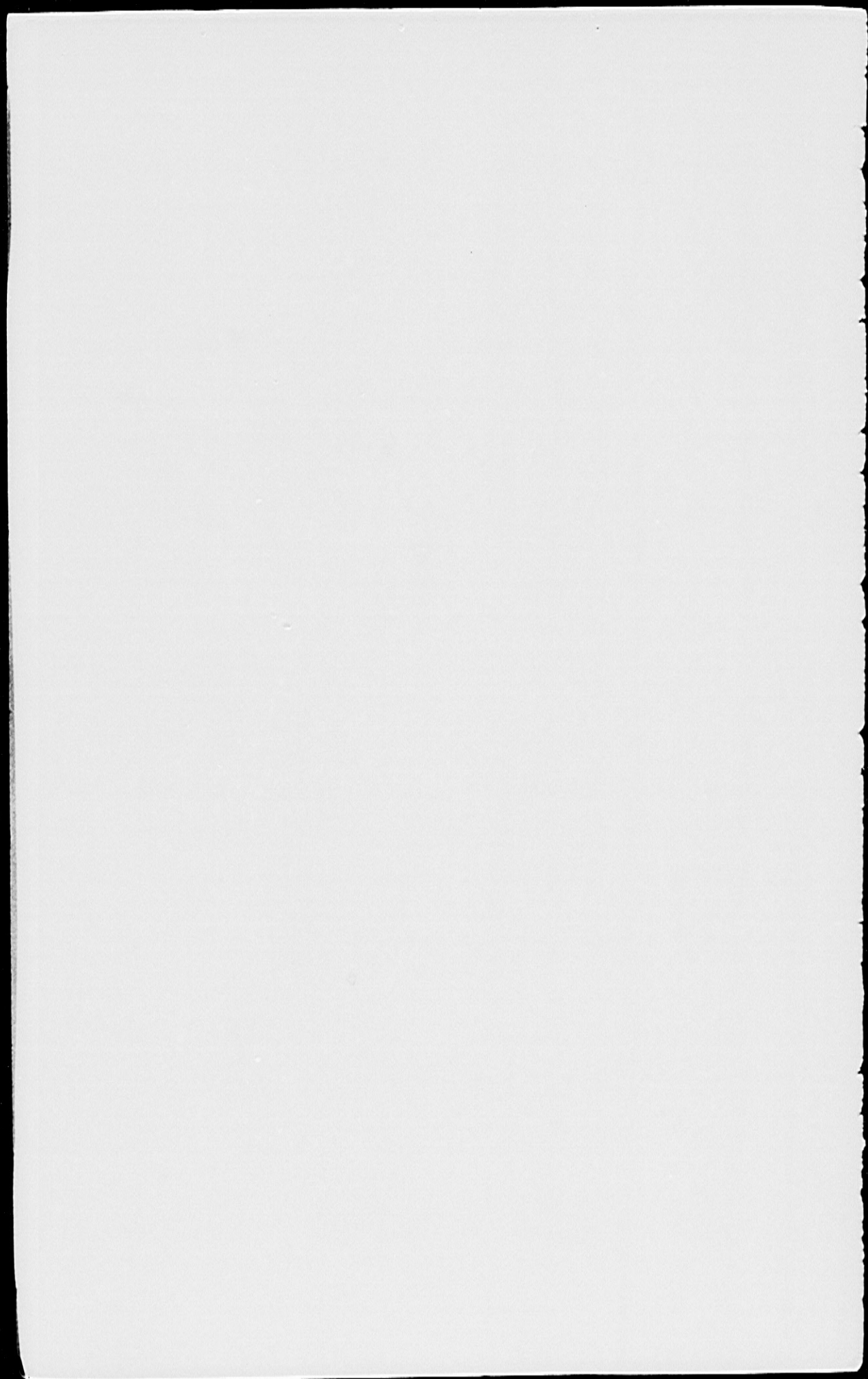
¹⁵ Taking into account the strong case with which counsel was faced, and in view of the fact that he carefully elicited the fact that appellant made no attempt to flee at the time of his arrest (Tr. 63), the record does not foreclose the possibility that counsel's lack of objection was a considered tactic in connection with his argument to the jury.

CONCLUSION

WHEREFORE, appellee submits that appellant's assignments of error are unmeritorious and that the judgment should be affirmed.

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,718

214

WALTER DUDLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 17 1966

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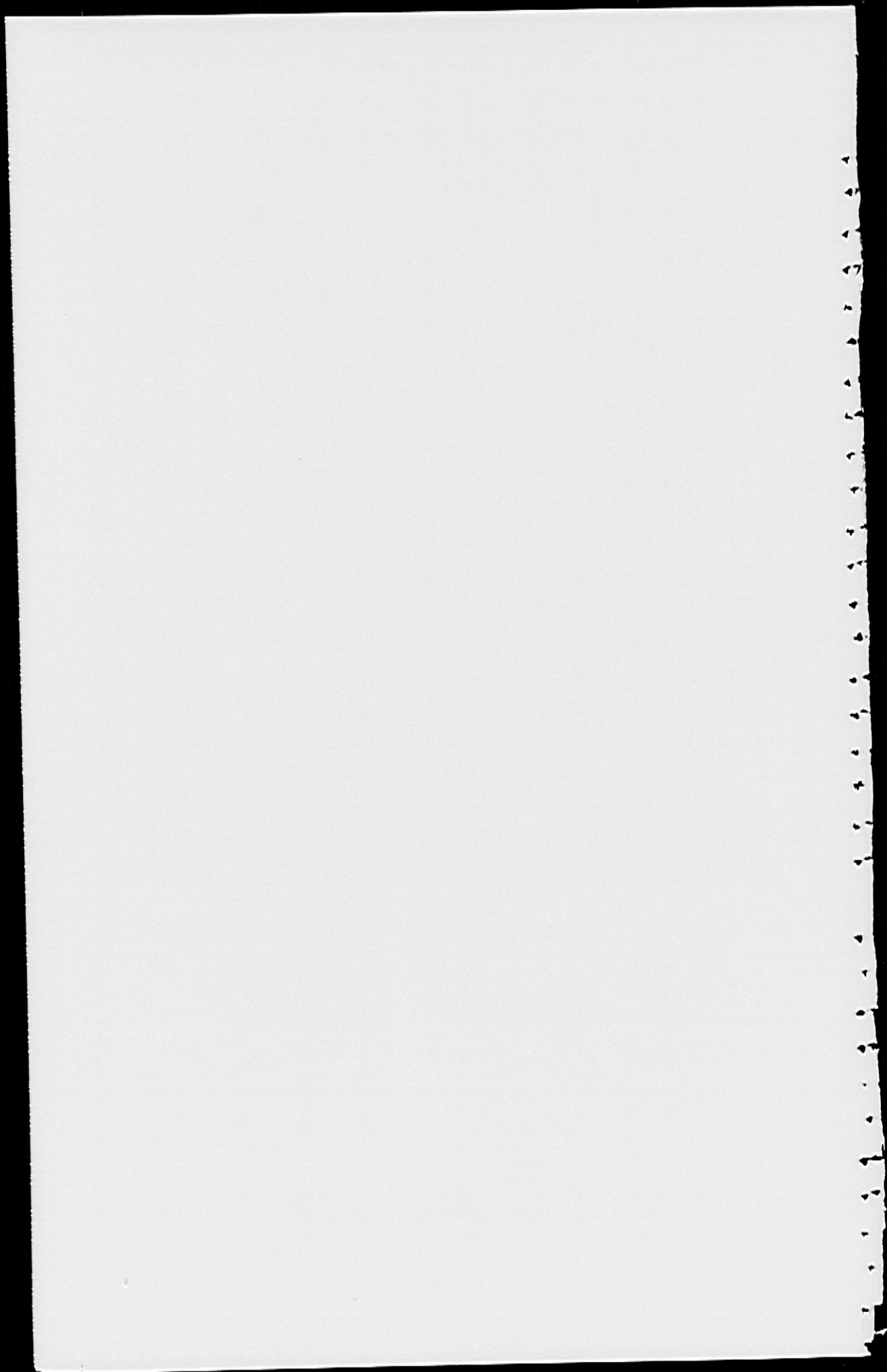
QUESTIONS PRESENTED

1. Where the uncontradicted evidence before the jury showed that, on six different days, appellant arrived at a proven numbers counting house with overstuffed pockets at precisely the time when pick-up men normally deliver numbers slips, where appellant was seen entering the counting house and remaining there during the "crucial hours" of a numbers operation, where appellant was seen escaping from the very room in which numbers slips and other gambling paraphernalia were recovered by the police, and where appellant first denied and then tacitly admitted his presence in the counting house, did the trial judge err by refusing to direct an acquittal?

2. Did the trial judge commit error—

(a) by instructing the jury that possession of numbers slips could be proven by circumstantial evidence; and

(b) by instructing the jury that flight does not necessarily reflect a feeling of guilt, that such feelings are present in many innocent people, that the jury is not to presume guilt from flight but that it has a right, though it is not required, to consider flight as one circumstance tending to show feelings of guilt?



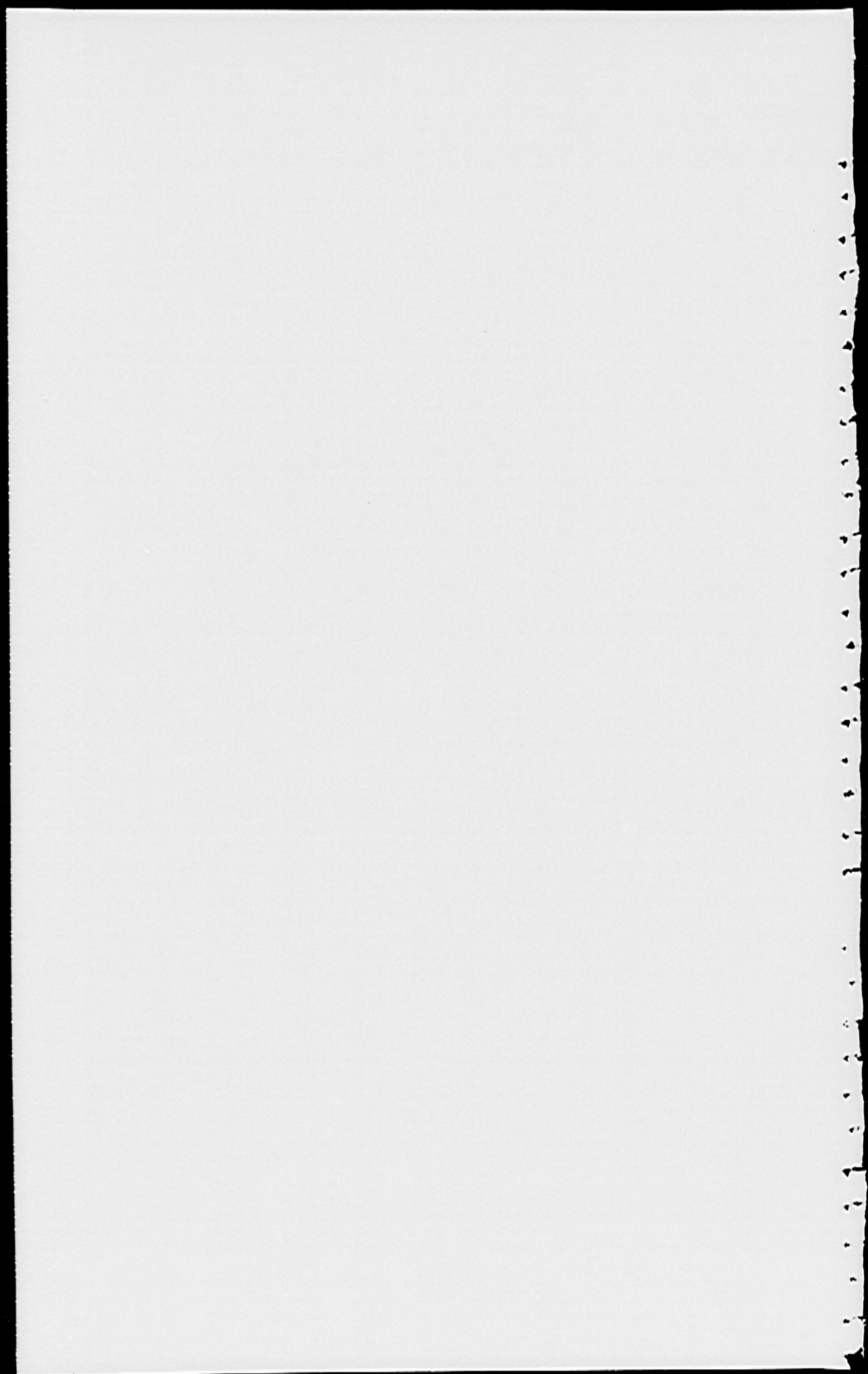
INDEX

	Page
Counterstatement of the case	1
Statutes involved	4
Summary of argument	6
Argument:	
I. The evidence was more than sufficient to convict ap- pellant on all counts	6
II. The judge's instructions to the jury were correct	10
Conclusion	12

TABLE OF CASES

<i>Aikens v. United States</i> , 98 U.S. App. D.C. 66, 232 F.2d 66 (1956)	9
<i>Bates v. United States</i> , 95 U.S. App. D.C. 57, 219 F.2d 30 (1955)	11
<i>Cellino v. United States</i> , 276 F.2d 941 (9th Cir. 1960)	11
* <i>Davis v. United States</i> , 107 U.S. App. D.C. 76, 274 F.2d 585, <i>cert. denied</i> , 363 U.S. 806 (1959)	8, 9, 11
<i>Eason v. United States</i> , 281 F.2d 818 (9th Cir. 1960)	11
<i>Hallman v. United States</i> , 115 U.S. App. D.C. 350, 320 F.2d 669, <i>cert. denied</i> , 375 U.S. 822 (1963)	11
<i>Hirabayashi v. United States</i> , 320 U.S. 81 (1943)	10
<i>Miller v. United States</i> , 116 U.S. App. D.C. 45, 320 F.2d 767 (1963)	11
<i>Moore v. United States</i> , 117 U.S. App. D.C. 376, 330 F.2d 842 (1964)	10
<i>Stephens v. United States</i> , 106 U.S. App. D.C. 249, 271 F. 2d 832 (1959)	7
<i>United States v. LaRocca</i> , 224 F.2d 859 (2d Cir. 1955)	11
<i>United States v. Malfi</i> , 264 F.2d 147 (3d Cir. 1959)	11
<i>United States v. Maroy</i> , 248 F.2d 663 (7th Cir.), <i>cert.</i> <i>denied</i> , 355 U.S. 931 (1957)	11
<i>United States v. Saunders</i> , 325 F.2d 840 (6th Cir. 1964)	11

* Cases chiefly relied on are marked by an asterisk.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,718

WALTER DUDLEY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on three counts in violation of the District of Columbia lottery laws. The indictment charged that appellant (1) promoted a numbers game from November 4 to 13, 1964, (2) possessed numbers slips, and (3) maintained gambling premises (22 D.C. Code §§ 1501, 1502, 1505, respectively). Appellant was tried before a jury and convicted on all three counts. He received concurrent sentences of one to three years on count one and one year each on the other counts.

Appellant's main contention on this appeal is that there was insufficient evidence for his conviction and the trial

judge erred by failing to direct an acquittal on all three counts. Since appellant offered no evidence in his own defense, the Government's case stands uncontradicted as follows:

In early November, 1964, Officers Durham and Goldston, Metropolitan Police detectives with a combined experience of more than fifteen years on the gambling and liquor squad, began their surveillance of a suspected counting house or center for illegal numbers game activities. The two officers watched the suspected premises only during the "crucial hours" for a numbers investigation, which is between one and four o'clock in the afternoon. In early afternoon, the numbers pick-up men normally visit the various "drops" or substations where numbers writers have deposited their numbers slips or bets for the day. Stuffing these numbers slips into their pockets or into paper bags, the pick-up men deliver them to the counting house. This delivery normally takes place between two and two-thirty, because the slips have to be processed by the counting house clerks before the first pari-mutuel total is announced. The day's winning number is formed by applying a predetermined formula to derive three separate digits from the pari-mutuel totals of specified races at various tracks. (See Tr. 12-14, 19, 26-28 for a general description of these numbers activities and the times involved.)

On each of the six days (November 4, 5, 6, 9, 10, 12) that Officers Goldston and Durham watched, appellant was seen going into the suspected premises at precisely the same period of time (2 to 2:30 p.m.) (Tr. 4-8). On each of these occasions, appellant's pants pockets appeared to be grossly over-stuffed (Tr. 5, 113). Before entering, he would carefully check to make sure nobody was observing him (Tr. 7). Appellant evidently never saw the police who were watching from an unmarked car in the same block as the counting house (Tr. 16). Then appellant would go into the house and remain there until the surveillance was discontinued at 4:00 p.m. (Tr. 5).

After one and one-half weeks of surveillance, the officers obtained a search warrant for the premises and a "John Doe" arrest warrant for appellant. On Friday the 13th of November, the two officers went to the suspected counting house during the "crucial hours" (2:43 p.m.) to execute their warrants (Tr. 37). Officer Goldston went to the rear of the house and Officer Durham, together with four other officers, went to the front door (Tr. 24). The officers knocked on the front door and loudly announced their authority and purpose. They waited approximately two minutes, knocked again, received no response, and then forced their way into the house (Tr. 24). Shortly after the second knock, Officer Goldston saw appellant climbing out of a second-story window at the rear of the house and onto the roof of an adjoining building (Tr. 65). The officer ran around the building to intercept appellant, but was unable to find him (Tr. 66). He then returned to the house to assist the other officers in their search of the premises.

Meanwhile, Officer Durham and the other officers had made their way to the second floor, where they found and arrested an individual named Williams in a room containing two telephones and considerable numbers game paraphernalia (Tr. 24). An open window in this same room was determined to be the same window out of which Officer Goldston had seen appellant fleeing (Tr. 24-25, 66-69). What the officers found in the room left no doubt, in their minds, that the premises had indeed been a numbers counting house. Scattered on the table and chair were a large quantity of numbers slips indicating a total day's "play" (or bets) of almost \$750 (Tr. 35-37). On the floor was a metal box containing "cut cards" which are distributed to numbers writers to indicate number combinations that carry reduced odds (Tr. 33-35). Officers also recovered a "rundown tape" showing all of the bets taken by each writer, who is given a code designation such as "K-99" (Tr. 36, 98). In all, there were 148 numbers slips with 15 different codes (Tr. 37). There was an adding machine on one of the chairs (Tr. 31) and

a "talley sheet" was on the table (Tr. 35). This "talley sheet" reflected the total amount bet on each number (Tr. 43). Other evidence introduced at trial included a calendar which listed numbers that had come up in previous days (Tr. 39) and numbers tout sheets ("Sneaky Petes") (Tr. 59).

Several days after the raid, Officers Goldston and Durham saw appellant standing on the corner of 17th and Eye Streets, Southeast (Tr. 69). They told appellant that they had a warrant for his arrest and that he need not make any statement. Immediately he acknowledged that he had visited friends at the counting house address on numerous occasions and that he had known Williams (the individual arrested during the raid) for about 15 years (Tr. 70). He denied being at the counting house on Friday the 13th, but when Officer Goldston told appellant that he had seen him come out of the second floor window, appellant responded, "Well, if I did it would be your statement against mine because you were the only one at the rear of the premises." (Tr. 70).

STATUTES INVOLVED

Title 22, § 1501, District of Columbia Code, provides in pertinent part:

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or

share of a ticket in any lottery or any such bill, certificate, token or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. * * *.

Title 22, § 1502, District of Columbia Code, provides:

If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

Title 22, § 1505, District of Columbia Code, provides in pertinent part:

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * *

(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than \$1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than \$2,000, or both.

SUMMARY OF ARGUMENT

I

The uncontradicted evidence showed that appellant arrived at a numbers counting house every day at the precise time when pick-up men normally deliver numbers slips. His pants pockets were overstuffed and his demeanor suggested that he was afraid of being observed. He went into the counting house and remained there during the "crucial hours" of a numbers operation. He was seen escaping from the very room in which numbers slips and other gambling paraphernalia were recovered by the police. He lied about his presence in the counting house on the day of his escape, but he then tacitly admitted presence to one of the arresting officers. This evidence clearly showed promotion and maintenance of a numbers operation as well as possession of numbers slips. But even if there had been error in submitting one or both of the counts concerning possession and maintenance to the jury, this Court need not even consider such claims of error because appellant received concurrent sentences.

II

Because circumstantial evidence may be used to show possession of numbers slips, the trial judge was correct in instructing the jury about constructive possession. The trial judge's flight instruction merely paraphrased the instruction suggested by Chief Judge Bazelon in a 1963 decision and no court has yet held that a judge is obligated to caution the jury to give little value to flight evidence (as suggested by appellant).

ARGUMENT

- I. The evidence was more than sufficient to convict appellant on all counts.

Appellant characterizes the Government's case as one consisting only of "bulging pocket" and flight evidence.

In fact, the jury had much more conclusive evidence before it.

Every afternoon at precisely the same time (2 to 2:30 p.m.), appellant consistently arrived at a numbers counting house with his pants pockets obviously overstuffed and distended (as demonstrated to the jury at Tr. 113). To observing police officers with long years of experience in numbers game investigations, appellant's appearance and actions reflected a familiar pattern.¹ Every racing day, pick-up men normally retrieve large quantities of numbers slips from various "drops" or substations where numbers writers leave their bets for the day (Tr. 13). These pick-up men stuff the slips into their pockets or paper bags and deliver them to the counting house between two and two-thirty in the afternoon (Tr. 13, 28). This delivery time is fairly consistent because counting house clerks must tabulate the numbers before the pari-mutuel totals are announced at 4 or 4:30 p.m. (Tr. 28).

Every day when appellant approached the house, he would carefully look around to make sure he was not being observed (Tr. 7). Then he would go into the house which contained an adding machine and other paraphernalia indicating that it was a central office for the numbers game (Tr. 31-37). He remained there during the "crucial hours" of a numbers operation (Tr. 4). This is the time prior to four o'clock when all numbers slips are processed and winners are selected according to a predetermined pattern of numbers derived from pari-mutuel totals at various race tracks (Tr. 12-14).

The police selected a time during these "crucial hours" to raid the suspected counting house (2:43 p.m.) (Tr. 37). One of the officers in this raid had just observed

¹ See Tr. 12-14, 19, 26-28 for a general discussion of the numbers game, especially with regard to the significance of various time periods. Police officers' experience and knowledge of these factors were considered important when this Court found probable cause for the arrest of an appellant convicted in a similar numbers violation. *Stephens v. United States*, 106 U.S. App. D.C. 249, 271 F.2d 832 (1959).

appellant on six different occasions in the preceeding week and a half, and he was posted behind the counting house (Tr. 24). This officer of course recognized appellant who escaped out of a rear window leading from the very room with all of the numbers slips and counting house paraphernalia (Tr. 65-67). A thorough search of this room revealed an extensive numbers operation involving at least fifteen writers (Tr. 37).

When arrested several days later, appellant lied about his presence in the counting house on the day of the raid, although he admitted making regular visits there (Tr. 70). Then he virtually admitted his presence on that day by telling the same officer who had seen him escape that, even if he had been there, it would be the officer's word against his because the officer was the only one at the rear of the building (Tr. 70).

Standing alone, appellant's overstuffed pockets and his flight from certain arrest would have been sufficient to submit the case to the jury.² But added to these elements

² Cf. *Davis v. United States*, 107 U.S. App. D.C. 76, 274 F. 2d 585, cert. denied, 363 U.S. 806 (1959) (discussion with respect to appellant Ellis.) In that case, the trial judge directed an acquittal on one count of the indictment against appellant Ellis (22 D.C. Code § 1502) because there was insufficient evidence to show possession under that count. Then the judge instructed the jury that possession of numbers slips was *prima facie* evidence of guilt in the promotion of a lottery (§ 1501). Chief Judge Bazelon, in an opinion affirming Ellis' conviction, wrote:

"In this case, there was, at least with respect to Ellis, enough other circumstantial evidence of promoting a lottery to raise a jury question. * * * When this evidence is viewed in light of the facts (1) that the place to and from which Ellis carried these bags was shown to be a numbers counting house, and (2) that a numbers operation of the size shown here requires the daily assembling of thousands of tickets from all over the city, we think that the jury could rationally conclude beyond a reasonable doubt that the brown bags in Ellis' possession contained numbers slips." *Id.* at 78-79, 274 F.2d at 587-588.

The evidence in *Ellis* consisted of only three observations, not six as here. Moreover, two of the *Ellis* observations took place during the evening or outside the "crucial hours" of a numbers operation. Finally, there was no flight from arrest in the *Ellis* case. Indeed, the only additional evidence in *Ellis* related to the fact that it was a

are (1) the significance of appellant's daily arrival at a time when numbers slips are normally delivered to a counting house, (2) the fact that appellant remained in the counting house during the "crucial hours" of a numbers operation, (3) the fact that his escape was from the very room where the slips and other paraphernalia were located, (4) his lies concerning his presence on the day of the raid, and (5) his tacit admission of presence. This is more than sufficient for a jury to infer that appellant carried numbers slips to the counting house on a regular basis and participated in the processing of these slips after he arrived.³

The evidence was sufficient to send all three counts to the jury. Count one charged appellant with promoting a numbers game, and it is clear from the evidence, above, that appellant must have participated either as a runner, a pick-up man, a counting house clerk, a manager, or that he served in all of these capacities. The next count charged him with possession of numbers slips. The fact that he was seen entering the counting house with over-stuffed pockets and seen leaving the house from the very room where large quantities of numbers slips were recovered was sufficient circumstantial evidence to raise a jury question. See *Davis v. United States*, *supra* (discussion regarding appellant Ellis). The last count

slightly larger numbers operation than appellant's. However, this is significant only insofar as the pick-up man in *Ellis* needed a paper bag to carry the numbers slips, while appellant in this case could accommodate all of the slips in his pockets.

³ Appellant cites *Aikens v. United States*, 98 U.S. App. D.C. 66, 232 F.2d 66 (1956), as a precedent for reversal in his appeal. His reliance on *Aikens* is misplaced, because the only evidence linking appellant Kingsbury (whose conviction was reversed) to the numbers game was his association with the other defendants. On the other hand, appellant Aikens' conviction was affirmed in that same case, because evidence showed that he "regularly visited this apartment as part of his daily routine, under circumstances which justified the inference that he was a numbers pick-up man." The reversal of appellant Berry's conviction in *Davis v. United States*, *supra*, also relied on by appellant, was another case in which the only evidence for conviction was guilt by association.

charged appellant with maintaining gambling premises, and the fact that he remained on the premises during the crucial hours of a numbers operation raises a sufficient question of control for the jury to consider it.⁴

II. The judge's instructions to the jury were correct.

Appellant charges error in the judge's instructions concerning possession⁵ and flight.⁶

⁴ Even if the trial judge did err by failing to direct a verdict of acquittal on one or both of the last two counts, the sentences for each are concurrent with count one and this Court need not even consider any claim of error under either count. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Moore v. United States*, 117 U.S. App. D.C. 376, 330 F.2d 842 (1964).

⁵ In charging the jury on Count Three (possession of numbers slips), the trial judge said:

In this connection, possession as used in the statute and in this count of the indictment means not merely actual physical possession but includes constructive possession as well. Constructive possession occurs when a person does not have within his hands or grasp the articles in question but does have dominion and control over the article. Thus, if you find that the defendant had domicile and control over any of the various items found in the back room of the premises in question, which were used or to be used in a lottery, that would constitute constructive possession on the third count of the indictment. (Tr. 154)

⁶ The trial judge's flight instruction was as follows:

There has been offered in evidence testimony tending to show flight of the defendant from the scene of the alleged crimes. This evidence may be considered in connection with the other evidence in the case. Where evidence is offered tending to show defendant's flight, that is, that he went away from the scene of the alleged offense, it would be for you to say whether or not it was a flight as a matter of fact. You would have to determine from the evidence whether it was a flight or not and then you would consider such evidence in the light of all the other evidence in the case, giving each part such weight as you think it is entitled to receive. Flight does not necessarily reflect a feeling of guilt. Feelings of guilt which are present in many innocent people do not reflect actual guilt. In this case if you find that in fact the defendant did flee from the scene, while you are not to presume guilt from the flight, you have a right, but you are not required, to consider the

Since the constructive possession charge refers only to one count of the indictment, and since appellant received a concurrent sentence on that count, this Court need not even consider this assignment of error.⁷ Nevertheless, there was no error. Many courts have held that possession shown by circumstantial evidence should be treated no differently than possession proven by direct evidence.⁸ The only real question is whether the circumstantial evidence in this case was sufficient for the possession count (§ 1502) to go to the jury (see argument No. 1, *supra*). Appellant came to a counting house with overstuffed pockets at precisely the time when most pick-up men deliver numbers slips. He escaped from the very room where a quantity of numbers slips were recovered. With this evidence before it, the jury could infer possession. See *Davis v. United States*, *supra*. The trial judge simply explained this to the jurors in the instruction here challenged.

The trial judge's flight instruction merely paraphrased the language suggested by Chief Judge Bazelon in *Miller v. United States*.⁹ There is no law or case to support ap-

defendant's flight as one circumstance tending to show feelings of guilt and you may, but you are not required, to consider these feelings of guilt as evidence tending to show actual guilt. (Tr. 147)

⁷ See Note 4, *supra*.

⁸ *Hallman v. United States*, 115 U.S. App. D.C. 350, 320 F.2d 669, *cert. denied*, 375 U.S. 882 (1963); *Bates v. United States*, 95 U.S. App. D.C. 57, 219 F.2d 30 (1955); *United States v. Saunders*, 325 F.2d 840, 844 (6th Cir. 1964); *Eason v. United States*, 281 F.2d 818, 820 (9th Cir. 1960); *Cellino v. United States*, 276 F.2d 941, 946 (9th Cir. 1960); *United States v. Malfi*, 264 F.2d 147, 150 (3d Cir. 1959); *United States v. Maroy*, 248 F.2d 663, 666 (7th Cir.), *cert. denied*, 355 U.S. 931 (1957); *United States v. LaRocca*, 224 F.2d 859 (2d Cir. 1955).

⁹ 116 U.S. App. D.C. 45, 61, 320 F.2d 767, 773 (1963):

When evidence of flight has been introduced into a case, . . . the trial judge should explain to the jury . . . that *flight does not necessarily reflect feelings of guilt*, and that *feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt* [T]hey are not to presume

pellant's unusual suggestion that a trial judge must go even further in his flight instruction and caution the jury that such evidence should be "given little value." (See Appellant's Brief, pages 22-23.) There was no error in this or any instruction.

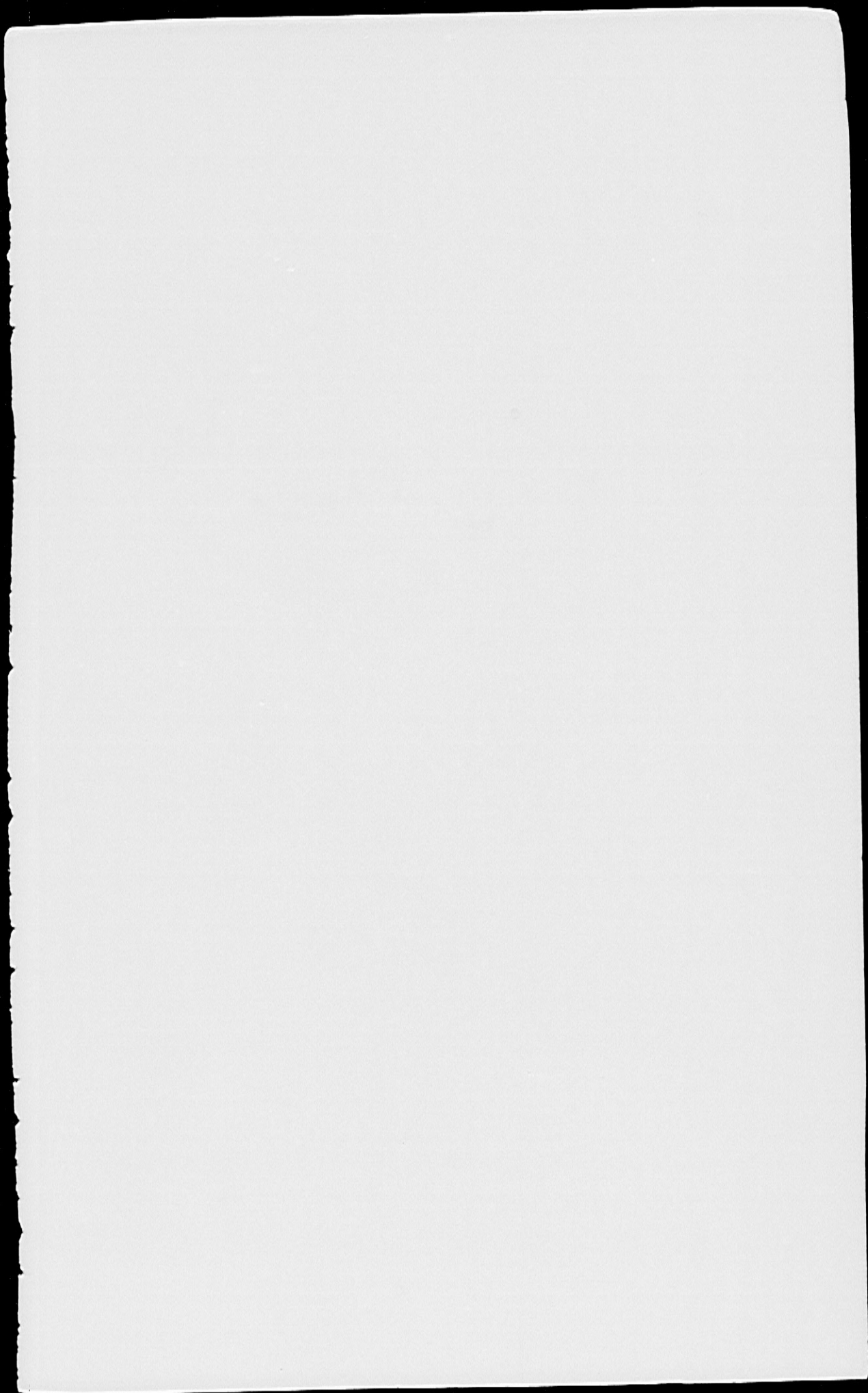
CONCLUSION

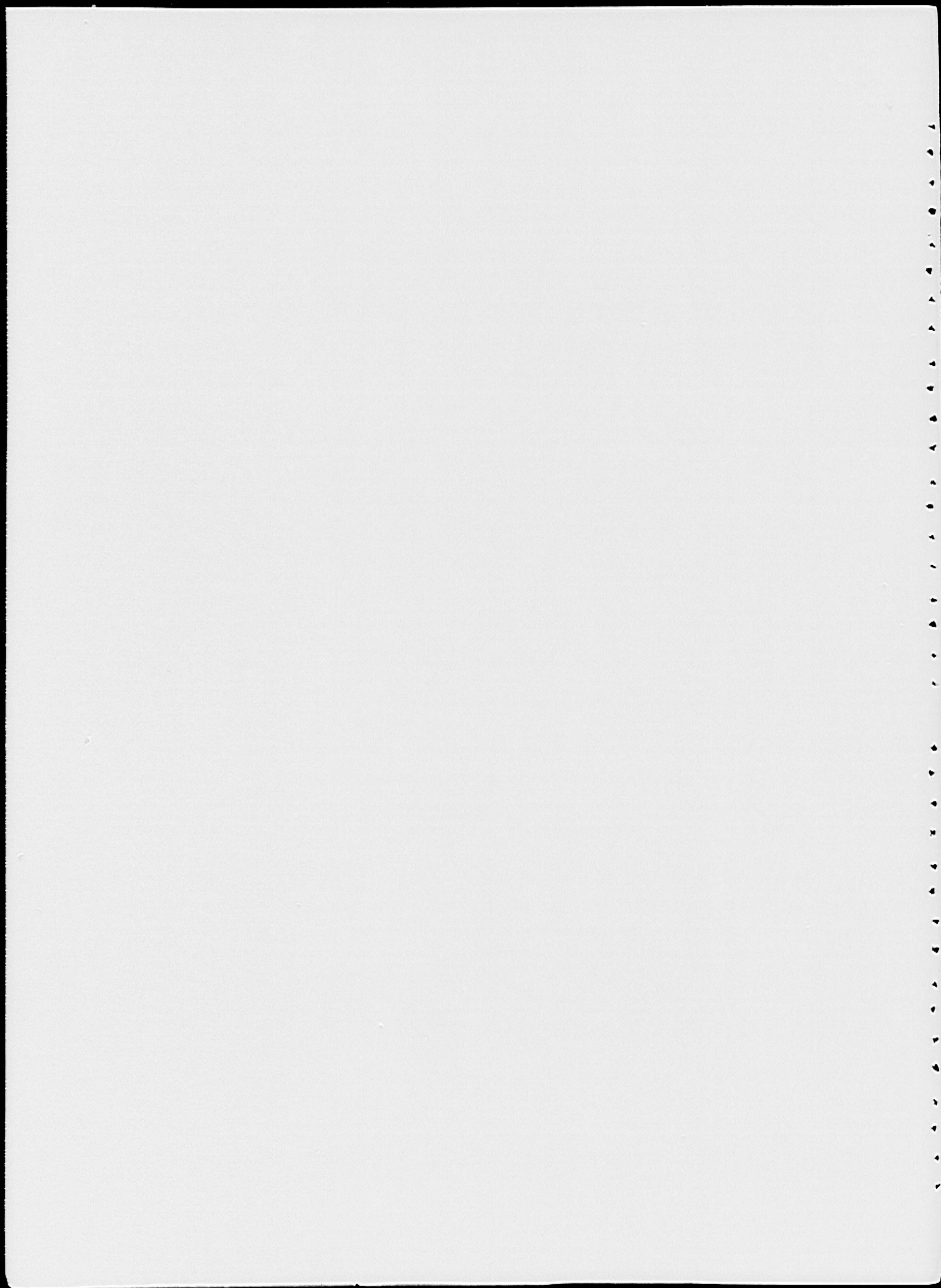
WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
RICHARD M. COLEMAN,
DEAN W. DETERMAN,
Assistant United States Attorneys.

guilt from flight; . . . they may, but need not, consider flight as one of the circumstances tending to show feelings of guilt; and . . . they may, but need not, consider feelings of guilt as evidence tending to show actual guilt. (The italicized portions reflect the exact words used in the challenged instructions. See note 6, *supra*.)





BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19718

WALTER DUDLEY,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

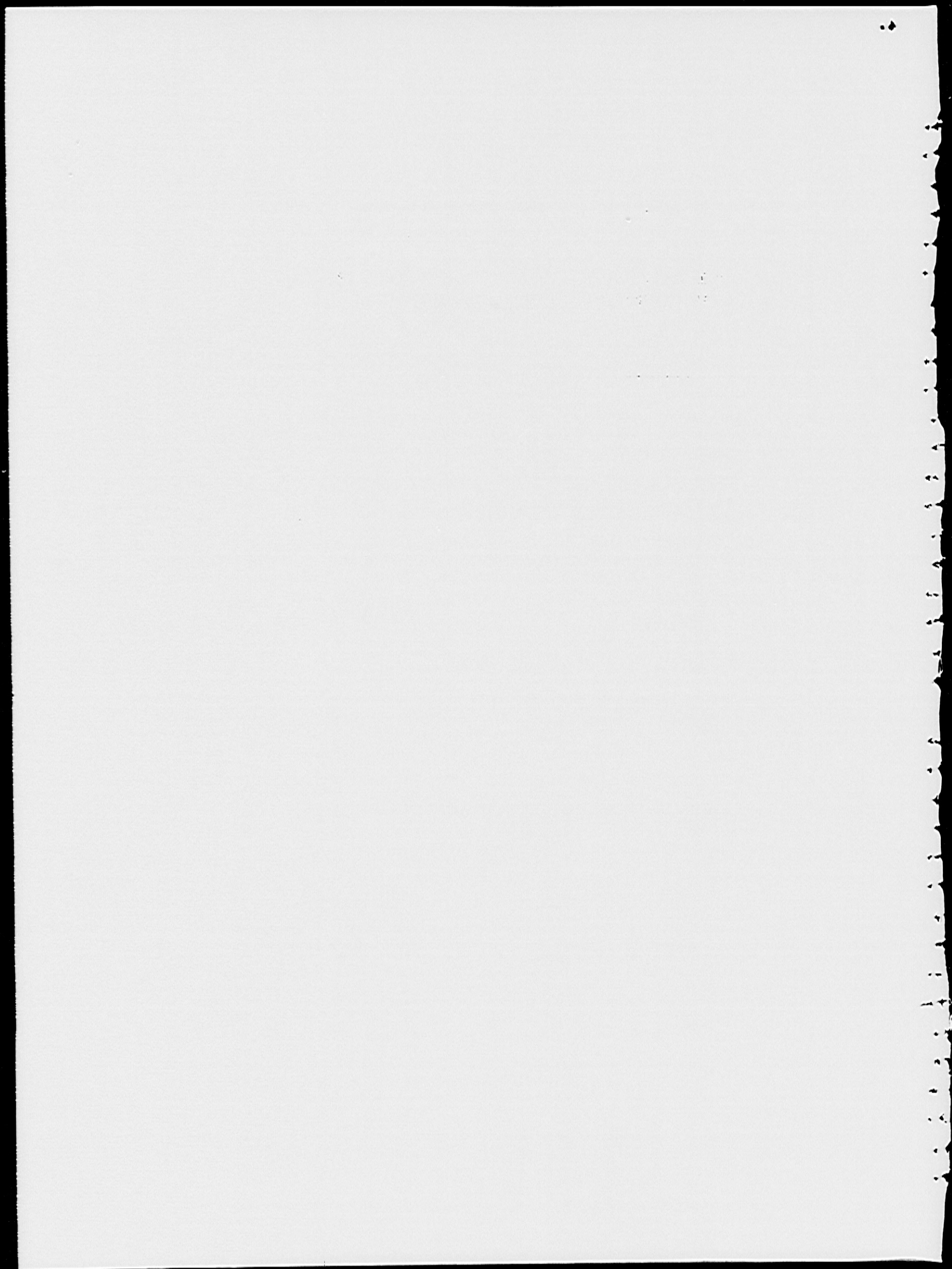
United States Court of Appeals
for the District of Columbia Circuit

50 JAN 13 1968

Nathan J. Paulson
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Attorney for Appellant
(Appointed by this Court)



QUESTIONS PRESENTED

1. Whether the evidence in this case was sufficient to allow for a conviction for the violation of Sections 1501, 1502, and 1505 of Title 22 of the District of Columbia Code.
2. Whether the trial court committed prejudicial error in its instruction to the jury regarding constructive possession.
3. Whether the trial court committed prejudicial error in its instruction to the jury on the matter of flight.

INDEX

	<u>PAGE</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES INVOLVED	6
STATEMENT OF POINTS	10
SUMMARY OF ARGUMENT	10

ARGUMENT:

I. In view of the insufficient evidence to allow for a conviction for a violation of sections 150, 1502 and 1505 of Title 22 of the District of Columbia Code, the trial court erred in failing to direct a judgment of acquittal on all counts.	11
II. The court erred in instructing the jury on the matter of constructive possession.	20
III. The court erred in the instruction to the jury on flight.	22
CONCLUSION	24

TABLE OF CASES

<u>Adams v. United States</u> , 118 U.S. App. D.C. 364, 336 F.2d 753, <u>cert. denied</u> , 379 U.S. 77 (1964).	16
<u>Aikens v. United States</u> , 98 U.S. App. D.C. 66, 232 F.2d 66 (D.C. Cir. 1956)	17
<u>Carter v. United States</u> , 231 F.2d 232 (5th Cir.), <u>cert. denied</u> , 351 U.S. 984 (1956)	13
<u>Commonwealth v. Moore</u> , 180 Pa.S. 538, 118 A.2d 212 (Pa. Sup. Ct. 1955)	19

INDEX CONTINUED

PAGE

<u>Cooper v. United States</u> , 94 U.S. App. D.C. 343, 218 F.2d 39 (1954)	16
<u>Davis v. United States</u> , 107 U.S. App. D.C. 76, 274 F.2d 585 (D. C. Cir.), <u>cert. denied</u> , 361 U.S. 916 (1959)	18
<u>Hendricks v. State</u> , 73 Ga. 481, 37 S.E. 2d 169 (C.A. Ga. 1946)	19
<u>Jackson v. United States</u> , 102 U.S. App. D.C. 109, 250 F.2d 772 (D.C. Cir. 1957)	19
<u>Miller v. United States</u> , 116 U.S. App. D.C. 45, 320 F.2d 767 (1963)	22
<u>People v. Wolosky</u> , 296 N.Y. 236, 72 N.E. 2d 172 (1947)	21
<u>United States v. Landry</u> , 257 F.2d 425 (7th Cir. 1958)	21
<u>United States v. Lewis</u> , 171 F.Supp. 71, <u>aff'd in part, rev'd in part</u> , 274 F.2d 585 (D.C. Cir.), <u>cert. denied</u> , 363 U.S. 806 (1959)	19
<u>United States v. Russo</u> , 123 F.2d 420 (3rd Cir. 1941)	21
<u>United States v. Wainer</u> , 170 F.2d 603 (7th Cir. 1948)	21
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1962)	16

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Douglas, "Vagrancy and Arrest on Suspicion", 70 <u>WALE</u> L.J. 1 (Nov. 1960)	14
Foote, "Vagrancy Type Law and Its Administration", 104 <u>UNIV. OF PA. L. Rev.</u> 603 (1956)	14
Goldberg, "Equality and Governmental Action", 39 N.Y.U. L. Rev. 205 (April 1964)	14
<u>Restatement of Torts</u> , 321	21
<u>Underhill's Criminal Justice</u> , §924 (5th ed. 1956) ...	15

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19718

WALTER DUDLEY,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section
1291 of Title 28, of the U. S. Code, and Rule 37 of the Federal
Rules of Criminal Procedure.

STATEMENT OF THE CASE

On November 13, 1964, officers of the Gambling and Liquor Squad of the Metropolitan Police Department made application to the U. S. Commissioner for certain arrest warrants, including one for appellant Walter Dudley, and a search warrant for premises 1115 2d Street, Southeast, in the District of Columbia.

Supporting the application was a four (4) page affidavit by Detectives Durham and Goldston of the Gambling and Liquor Squad which was principally devoted to a detailed description of various observations made of contacts and activities of a person, later identified as Williams, at various locations around Washington, with minor observations noted as to a person subsequently asserted to be Dudley entering the premises 1115 2d Street, Southeast, with "bulging pockets". At the trial, Detective Goldston testified that he had observed appellant walk to and enter the premises 1115 2d Street, Southeast, with "bulging pockets" on seven different occasions during the two week period prior to November 13, 1964 (Tr. 67).

The warrants were served and upon execution thereof on November 13, 1965, Williams was arrested on the premises. Williams was found on the second floor in a rear bedroom

which contained, among other things, a table, number slips, an adding machine, playing cards and other articles. (Tr. 24)

Soon after the search began, Detective Goldston testified that he observed appellant leaving the premises by a second floor window (Tr. 65).

At most, the evidence suggested the mere presence of the appellant on the premises on several occasions as a visitor (Tr. 52-3, 56, 92, 104). Private Gorney stated that evidence was found that a woman actually occupied the premises (Tr. 56-7).

Appellant was arrested on November 17, 1965, four days after the search of the premises, at the corner of 7th and Eye Streets, Southeast (Tr. 69). He was searched, but no numbers slips or other gambling paraphanelia were found on his person (Tr. 100). Following his arrest, appellant was indicted, and charged with three (3) counts: operating a lottery (count one), possessing numbers slips (count three) and maintaining gambling premises (count four).

The defendant made a motion for a directed verdict of acquittal at the close of the evidence which was denied (Tr. 132).

During the course of the charge to the jury, the Court instructed the jury as follows:

On the question of flight:

"There has been offered in evidence testimony tending to show flight of the defendant from the scene of the alleged crimes. This evidence may be considered in connection with the other evidence in the case. Where evidence is offered tending to show defendant's flight, that is, that he went away from the scene of the alleged offense, it would be for you to say whether or not it was a flight as a matter of fact. You would have to determine from the evidence whether it was a flight or not and then you would consider such evidence in the light of all the other evidence in the case, giving each part such weight as you think it is entitled to receive. Flight does not necessarily reflect a feeling of guilt. Feelings of guilt which are present in many innocent people do not reflect actual guilt. In this case if you find that in fact the defendant did flee from the scene, while you are not to presume guilt from the flight, you have a right, but you are not required, to consider the defendant's flight as one circumstance tending to show feelings of guilt and you may, but you are not required, to consider these feelings of guilt as evidence tending to show actual guilt." (Tr. 147)

On the question of constructive possession:

"In this connection, possession as used in the statute and in the count of the indictment means not merely actual physical possession but includes constructive possession as well. Constructive possession occurs when a person does not have within his hands or grasp the article in question but does have dominion and control over the article. Thus, if you find that the defendant had dominion and control over any of the various items found in the back room of the premises in question, which were used or to be used in a lottery, that would constitute constructive possession on the third count of the indictment." (Tr. 154).

Timely objections were made to these portions of the charge.

On July 7, 1965, the jury returned a verdict of guilty on all three counts. On July 15, 1965, the judgment was entered and Dudley was sentenced to one to three years on count one, one year on count three to run concurrently, and one year on count four, to run concurrently.

It is from this judgment and verdict that the appellant appeals.

STATUTES INVOLVED

Section 1501 of Title 22, District of Columbia Code:

"§22-1501 Lotteries - Promotion - Sale or Possession of Tickets. If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest or of any such ticket, certificate, bill, token, or other device shall be prime-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

Section 1502 of Title 22, District of
Columbia Code:

"§22-1502 Possession of Lottery or Policy Tickets. If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof."

Section 1505 of Title 22, District of
Columbia Code:

"§22-1505 Gambling premises - Definition - Prohibition against maintaining - Forfeiture - Liens - Deposit of moneys in Treasury - Penalty subsequent offenses.

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed gambling premises for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

(c) All moneys, vehicles, furnishings, fixtures, equipment, stock (including, without limitation, furnishings and fixtures adaptable to non-gambling uses, and equipment and stock for printing, recording, computing, transporting, safekeeping, or communication), or other things of value used or to be used.

(1) in carrying on or conducting any lottery, or the game or device commonly known as a policy lottery or policy, contrary to the provisions of section 22-1501;

(2) in setting up or keeping any gaming tables, bank, or device contrary to the provisions of section 22-1504; or

(3) in maintaining any gambling premises, shall be subject to seizure by any member of the Metropolitan Police force or the United States Park Police, or the United States Marshal, or any deputy marshal, for the District of Columbia, and shall, unless good cause is shown to the contrary by the owner, be forfeited to the District of Columbia by order of any court having jurisdiction unless good cause is shown to the contrary by the owner, for disposition by public action or as otherwise provided by law. Bona fide liens against property so forfeited shall, on good cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property. Forfeit moneys and other proceeds realized from the enforcement of this section shall be deposited in the Treasury of the United States to the credit of the District of Columbia.

(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than \$1,000, or both, unless the violation occurs after he has been convicted of a violation of this section in which case he may be imprisoned for not more than five years, or fined not more than \$2,000, or both."

STATEMENT OF POINTS

1. The evidence in this case is not sufficient to sustain the conviction of appellant for the violation of sections 1501, 1502 and 1505 of Title 22 of the District of Columbia Code.

2. The trial court erred in its instruction to the jury regarding constructive possession.

3. The trial court erred in its instruction to the jury on flight.

SUMMARY OF ARGUMENT

It is appellant's contention that the evidence in the case is insufficient to sustain a conviction on the counts of operating a lottery, possessing numbers slips and maintaining gambling premises.

In effect, testimony by the police does no more than suggest the presence of appellant on the premises. So-called "bulging pockets" observations should be considered evidence of an extremely low order. Flight is generally recognized as evidence of a low order. Whatever suspicion presence might raise, it is not sufficient to sustain a conviction on any of the counts.

Further, the trial court had no basis for charging the jury on the matter of constructive possession. The facts of this case make it clear that one Williams was in actual possession of the paraphenalia located in the second-floor bedroom, and the trial court should have directed a verdict for acquittal on count three.

Finally, the trial court erred in its instruction to the jury on flight. While the trial court quite properly pointed out that flight could be considered as one circumstance tending to show feelings of guilt and feelings of guilt could be considered as evidence tending to show actual guilt, the instruction should have made plain the fact that flight is evidence of a low order which by itself or even coupled with other extremely low order evidence could not sustain a conviction.

ARGUMENT I

In view of the insufficient evidence to allow for a conviction for a violation of sections 1501, 1502 and 1505 of Title 22 of the District of Columbia Code, the trial court erred in failing to direct a judgment of acquittal on all counts.

(With respect to Point 1, Appellant desires the court to read the following pages of the reporter's transcript: Tr. 11, 14-18, 20-22, 29-31, 38, 44-57, 73-89, 92-107, 111-113, 137-140, inclusive.)

The Government attempts to prove the elements of operating a lottery, possessing numbers slips and maintaining gambling premises by relying on the following:

(1) Observations of Dudley going into the premises at 1115 2nd Street, Southeast, with "bulging pockets" on seven different occasions.

(2) Observation of Dudley leaving the premises by a back window shortly after the execution of a search warrant.

No other evidence adduced in this case connected Dudley with the offenses charged. No evidence was adduced that Dudley made any visits to other places to infer he acted as a "pick-up" man, possessed numbers slips, participated in any gambling activity on the premises, owned or occupied the premises, owned any of the equipment or items on the premises, used the phone or had the phone in his name. By way of contrast, extensive observations had been made of Williams, engaged in various contacts and activities.

Over a period of time "bulging pockets" and the "brown bag" have become the hallmark of the calling. Carter v. United States, 231 F.2d 232 (5th Cir.), cert. denied, 351 U.S. 984 (1956). The well established judicial recognition of these mechanical evidentiary formulas have encouraged the police to be quick to use these phrases to describe suspects. The police and government counsel well appreciate the importance of the phrase, "bulging pockets".1/

1/ The unusual emphasis given this phrase is typified by one exchange in the trial court which went as follows:

"A. At about 2:20 P.M., November the 4th, 1964, while making an observation of premises 1115 2nd Street, Southeast, I observed the defendant Walter Dudley to walk to and enter premises 1115 2nd Street, Southeast, with bulging pockets, and --

THE COURT: What was the last thing you said,

THE WITNESS: With bulging pockets.

BY MR. COLEMAN:

Q. Bulging pockets?

A. Yes.

Q. What pockets were bulging? How was he dressed?

A. Well, somewhat like he's dressed now, with pants and shirt on, and just a jacket, and a jacket, a short jacket.

Q. And what pockets would be the ones that were bulging?

A. His pants pockets." (Tr. 5).

Whatever justification this verbal shorthand may have had in the past, we must conclude that it poses serious opportunities for abuse at present. The routine use of the bulging pockets language in numbers cases has drained such prosecutions of vital elements of fairness. When at best "bulging pockets" should be a slim reed of evidence upon which to rest a case, it has become key in prosecutions for lottery violations.

Common sense and common experience suggest that it is extremely difficult to differentiate between the innocent wearing of "baggy pants" and the too frequently accepted symbol of guilt, "bulging pockets". It is an unfortunate coincidence that those persons in the lower economic levels of society most likely to stuff things in their pockets and have "baggy pants" are those most frequently arrested and convicted upon insufficient evidence.^{2/} Police find it perhaps too easy to conclude that such persons are vagrants, or acting suspicious, or have "bulging pockets". That seems to be the case here.

^{2/} See e.g., Goldberg "Equality and Governmental Action", 39 N.Y.U. L.REV. 205 (April 1964); Douglas, "Vagrancy and Arrest on Suspicion," 70 YALE L.J. 1 (Nov. 1960); Foote, "Vagrancy Type Law and Its Administration", 104 UNIV. OF PA. L.REV., 603 (1956).

The officers who made observations of the appellant have an inexact recollection as to the vantage point and distance on each occasion. It seems clear that the observations were made from a moving car (Tr. 16). One specific recollection placed Detective Goldston more than three-quarters of a block away from the door of 1115 2nd Street, Southeast (Tr. 83). While such observations might enable a person to characterize another's general appearance, we strongly doubt the ability to do more than note that the clothing was ill-fitting and baggy. Apparently, the police assumed (1) that his pockets were bulging, (2) that they were bulging not because of ill fitting or baggy clothes, but because they were stuffed with contents, and (3) not that they contained innocent objects which an unemployed person visiting friends or wandering around town might carry in his pants pockets, but that they contained numbers slips. Given the fact that the observing officers never observed Dudley engaged in numbers transactions of any kind or making any contacts, all of which they observed Williams doing, the inference that Dudley's pockets were bulging with numbers slips seems wholly unwarranted. This court should make clear that so-called "bulging pockets" is evidence of an extremely

low order.

There was evidence offered in the court below that appellant fled from the premises. It is generally recognized that flight produces probative evidence of a low order. Adams v. United States, 118 U.S. App. D. C. 364, 336 F.2d 753, cert. denied, 379 U.S. 77 (1964); Wong Sun v. United States, 371 U.S. 471, 483 n. 10 (1962); Cooper v. United States, 94 U.S. App. D.C. 343, 345, 218 F.2d 39, 41 (1954).

Commentators have stressed that even if it can be shown that an accused fled to avoid arrest, its force is slight. Underhill's Criminal Justice, §924 (5th ed. 1956). The question of evidence which constitutes a basis for the jury to convict must be measured by the facts of a particular case.

We cannot believe that the combination of two weak evidentiary links - "bulging pockets" and flight - provide the kind of substantial factual basis required to support a conviction in this case.

Ample precedent for reversing the conviction of Dudley exists. In Aikens v. United States, 98 U.S. App. D.C. 66, 232 F.2d 66 (D.C. Cir. 1956), the court reversed the conviction of one appellant, Kingsbury, for operating and conspiracy to operate a lottery, possession of lottery tickets and maintaining gambling premises. The gambling premises there had actually been recently occupied by Kingsbury. Though he had moved out because of marital difficulties prior to the search, he had been observed going to the apartment on several later occasions after he purportedly moved out.

The Court pointed out:

"Under applicable tests, Kingsbury's motions for judgment of acquittal on all four counts should have been granted. His mere association with Aikens as they entered the apartment does not implicate him in the conspiracy. With respect to the substantive counts, Kingsbury was never shown to have been in possession of lottery tickets. The fact that slips were found in his former residence, without more, does not justify an inference that they belonged to him. Absent such proof, a violation of §22-1502 is not established,

nor can it be said that Kingsbury was guilty of maintaining gambling premises in violation of §22-1505 (b). The operation count under §22-1501 likewise must fall. That section provides that proof of possession establishes a prima facie case. Lacking that presumption, there was no evidence (such as proof that bets were written in the apartment) from which it could reasonably be inferred that Kingsbury operated a lottery." (at 68).

In Davis v. United States, 107 U.S. App. D.C. 76, 274 F.2d 585 (D.C. Cir.), cert. denied, 361 U.S. 916 (1959), the conviction of one of the appellants, Berry, for operating a lottery and maintaining gambling premises was reversed. There he had been seen entering the premises on several occasions, leaving the premises with Ellis who was carrying a brown paper bag, driving a car which Davis entered carrying two brown paper bags, and on the premises when the police raided them. The court concluded:

"With respect to Berry, the situation is quite different. There was no probative evidence that he was in possession of numbers slips. The entire testimony concerning his activities reveals only that he was repeatedly in the company of gamblers. While this evidence, standing alone, may be sufficient to raise the eyebrow of suspicion, it is insufficient to raise a question for the jury." (at 588).

It should be emphasized that at no time was Dudley found to be in possession of numbers slips. It should be noted that in United States v. Lewis, 171 F.Supp. 71, aff'd in part, rev'd in part, 274 F.2d 585 (D.C. Cir.), cert. denied, 363 U.S. 806 (1959), appellants Ellis and Berry were actually found in a second-floor bedroom strewn with lottery paraphenalia, but because there was no evidence tending to show that the appellants owned any of these materials or were in control of the premises, the trial judge directed a verdict of acquittal with respect to the possession count. Surely there is no basis to sustain the conviction on count 3. Jackson v. United States, 102 U.S. App.D.C. 109, 250 F.2d 772 (D.C. Cir. 1957).

While proof of possession of numbers slips is not essential to convict for operating a lottery, there must be other substantial evidence from which it could reasonably be inferred that Dudley was operating a lottery. Such evidence is lacking in this case. Mere presence on gambling premises with known gamblers is not enough. Commonwealth v. Moore, 180 Pa.S. 538, 118 A.2d 212 (Pa.Sup.Ct. 1955); Hendricks v. State, 73 Ga. 481, 37 S.E. 2d 169 (C.A.Ga. 1946).

Since the quantum of evidence necessary to secure a conviction for conducting a lottery does not have to be as comprehensive or full as for maintaining gambling premises, conviction for that conviction must likewise fail.

Commonwealth v. Moore, supra.

It is clear that the evidence was insufficient to exclude every reasonable hypothesis save that of guilt of the defendant. Accordingly, the lower courts failure to direct a judgment of acquittal on all counts was reversible error.

II

The court erred in instructing the jury on the matter of constructive possession.

(With respect to Part 2, appellant desires the court to read the following pages of the reporter's transcript: Tr. 30-31, 46-49, 56-58, 60-61, 92-102, 153-54, inclusive)

The lower court instructed the jury that a showing of constructive possession of gambling paraphanelia was sufficient to violate section 1502 of Title 22 of the District of Columbia Code.

No evidence was offered below to establish that Dudley had actual possession of numbers slips at any time (Tr. 99). As for the gambling paraphenalia in the second-floor room, no evidence was adduced to establish ownership or control in Dudley. At the time of the search, Williams was found in the

room with the alleged gambling materials and had actual possession of them. Under the circumstances, it was prejudicial error to have instructed the jury on the matter of constructive possession.

The court in United States v. Wainer, 170 F.2d 603 (7th Cir. 1948) stated:

"To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in nature."
(at 606).

As we already noted, the undisputed evidence shows that Williams, not Dudley, had actual control, care and management of the paraphernalia at the time it was found. The suggestion that Dudley may have had control at some point in time is at best sheer speculation. To charge that constructive possession is sufficient to hold Dudley responsible for the criminal charge of possessing numbers slips was in error. United States v. Russo, 123 F.2d 420 (3rd Cir. 1941); United States v. Landry, 257 F.2d 425, 431-2, (7th Cir. 1958); People v. Wolosky, 296 N.Y. 236, 72 N.E. 2d 172 (1947).

Section 216 of the Restatement of Torts defines "possession of a chattel" as being where a person has physical control of a chattel with intent to exercise control in his

own behalf or who had such physical control with such intent to exercise control although he is no longer in physical control, if he had not abandoned it and no other person has obtained possession. Even assuming that Dudley had at some point exercised control over the paraphenalia, at the time such paraphenalia was seized, it was in the actual possession of another. Therefore, even assuming for argument's sake constructive possession is sufficient to convict under section 1502 of Title 22, no such possession was here proved and the court erred in giving the above instruction.

III

The court erred in the instruction to the jury on flight.

(With respect to Point 3, appellant desires the court to read the following pages of the reporter's transcript: Tr. 147)

In Miller v. United States, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963), Judge Bazelon urged new safeguards in helping the jury understand the significance of evidence of flight. He emphasized that "The observation that feelings of guilt may be present without actual guilt in so-called normal as well as neurotic people has been made by many recognized scholars and is a significant factor in the contemporary view of the dynamics of human behavior." (at 772).

The trial court judge's instruction in this case, to the extent that it adopted the essentials of this formulation,

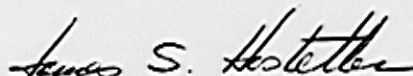
was sound.

However, on the facts of this case, the trial court erred in instructing the jury that it could give "such weight as you think it is entitled to receive" (Tr. 147). The fact is that the jury should have been appropriately cautioned that evidence of flight has little probative value. The jury should have been advised that flight, in the absence of other substantial evidence upon which to convict, should be given little value. The failure of the trial court to so instruct the jury was reversible error.

CONCLUSION

The appellant respectfully urges that under the law and the facts herein, there should have been no conviction, that the indicated errors were so prejudicial as to require a reversal of the conviction below. Therefore, appellant requests such a reversal.

Respectfully submitted,



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